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JURISDICTION, PRACTICE,  
AND  
PECULIAR JURISPRUDENCE  
OF THE  
COURTS OF THE UNITED STATES.

BY  
BENJAMIN ROBBINS CURTIS, LL.D.

*Second Edition,*  
REVISED AND ENLARGED.

BY HENRY CHILDS MERWIN,  
AUTHOR OF "THE PATENTABILITY OF INVENTIONS"; EDITOR OF "MER-  
WIN ON EQUITY AND EQUITY PLEADING," AND LECTURER  
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## PREFACE

### TO THE SECOND EDITION.

THE changes in the Statutory Law of the Federal Courts have been so great since the first edition of this book was published, that I have been obliged to omit a small part of it, and to add several new chapters and many new paragraphs. But my object has been—I need hardly say—to meddle as little as possible with the work of so great a lawyer and such a master of legal style as Judge Curtis. The notes to the first edition—with one or two exceptions—were added by the editors of that edition. Most of them have been preserved in the present edition, and the new notes are enclosed in brackets. And so as to the text;—my additions are enclosed in brackets, and all that part of it not so enclosed is the work of Judge Curtis, entirely unaltered.



By the kindness of Judge Thayer, of the Eighth Circuit, I have been permitted to make free use of his admirable monograph on the Jurisdiction of the Federal Courts ; and I am also indebted to Frederic Dodge, Esq., and James J. Storrow, Jr., Esq., for valuable suggestions.

The first edition of these lectures was edited by Judge Curtis's brother, Mr. G. T. Curtis, and by his son, who bore his name, who was also a judge, and whose early death cut off a life which was dear to his friends and of high value to the community.

H. C. M.

BOSTON, June 1, 1896.

## PREFACE

TO THE FIRST EDITION.

THESE Lectures were delivered by the late Judge Curtis to a class of students in the Harvard Law School, in the academic year 1872-73. They were wholly oral and extemporaneous, the lecturer making use of only a few brief notes, and relying chiefly upon his very strong memory, which never failed him in the statement of principles or the citation of authorities. A verbatim report was made of each Lecture by a short-hand writer, and from the manuscripts written out by him, and revised by Judge Curtis, the Lectures are now printed, without any change of the text.

But as they were delivered before the Revised Statutes went into operation, it became necessary to refer to that revision in the notes, for the purpose of guiding the reader to the re-enactment or change of the various statutes

cited in the text. Such references to the most recent decisions of the Supreme Court of the United States have also been added as seemed to be called for.

The Lectures, being addressed to a body of students just beginning their inquiries into the Jurisdiction, Practice, and Jurisprudence of the Federal Courts, are, of course, somewhat elementary. But it is believed that they are so comprehensive and accurate that they will form a useful handbook for practitioners of any standing. If future editions shall be required, any changes in the law, as well as the relevant decisions of the Supreme Court of the United States, from time to time, will be duly noted.

An index of the cases cited, and a full index of the subjects treated, have been prepared. The latter, it is presumed, will greatly assist the reader in consulting the work on particular points.

GEORGE TICKNOR CURTIS.

BENJAMIN R. CURTIS.

BOSTON, October, 1880.

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JURISDICTION, PRACTICE,  
AND  
PECULIAR JURISPRUDENCE  
OF THE  
COURTS OF THE UNITED STATES.

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CHAPTER I.

THE SUPREME COURT.

GENTLEMEN OF THE HARVARD LAW SCHOOL:—

I HAVE been requested to come here and deliver some lectures upon a subject of which you have been, undoubtedly, already informed, — the jurisdiction and practice, and some of the peculiar jurisprudence, of the courts of the United States. Before I speak directly of these topics, I wish to say a few words concerning their importance to you, and also concerning the method I shall pursue in these lectures.

When I came to the bar, forty years ago, there were comparatively few cases tried in the courts of the United States. They were generally important cases, but they were few, and the number of practitioners engaged in those courts was small. The practice was in the hands of a few leaders of the bar in the great cities or large towns where the courts were held; gentlemen of the bar residing



## 2 JURISDICTION, PRACTICE, AND JURISPRUDENCE.

elsewhere did not trouble themselves to acquire any knowledge, or they acquired but very slight knowledge, concerning either the jurisdiction or practice of those courts. In truth, they had nothing to do with them, except, perhaps, in some accidental way.

Owing to the great increase in the wealth and population of our country, in its interstate as well as its foreign commerce, in the means of locomotion, which have brought the different parts of the country so much nearer together, and in the value of patent and copy rights granted by the United States, as well as, during the last ten years, the extension of the powers of Congress over many subjects previously left to the exclusive legislation of the States, and therefore left exclusively to the judicial power of the States, — owing to these and other causes, all co-operating, the business of the courts of the United States has greatly increased; and these same causes are likely in the future to operate with increased efficiency. You will readily understand, therefore, that a gentleman about to enter the profession, who neglects to inform himself concerning the subjects of these lectures, neglects to obtain important means of usefulness and success.

A few words concerning the method I propose to pursue in what I have to say to you. I do not come here prepared with elaborate written dissertations; I have neither time nor inclination to prepare such; and in reference to these particular subjects, I can say with certainty that I think I can serve you better in the way I propose to treat them than I could by elaborate treatises; because my desire is,

not so much to endeavor to teach these things fully to you, as to induce you to learn them for yourselves, — to point out as well as I can what you are to look for and how you are to find it. Of course, it must depend upon yourselves whether you will look for it, whether you will find it, and what uses you will make of the information which I give you. But having confidence in your individual desires to make use of this information, I will endeavor, as well as I can, to show you how you can possess yourselves of these subjects by studying what I shall indicate to you. Nobody can teach them to you without your own study; you cannot learn them in any other way; and I do not entertain any doubt of your disposition to learn them in that way. Let me say, however, that, in order to do so, it will be necessary to take careful notes of the references I shall make, by which you will ascertain where you can go for knowledge of the different subjects which will be indicated.

In pursuing this method, of course it will be necessary to describe more or less fully all you are to look for, and thus to give, to some extent, a logical and clear account of the different topics, as well as of the authorities and sources from which they are to be derived.

I have had some doubt how to begin, — and to make a good beginning is very important, — whether to begin by considering first the District Courts, which are the lowest courts of the United States in the several States, and then the Circuit Courts, which rank next above them, and then the Supreme Court, or to follow an inverse order. It

has seemed to me most convenient, and that the system would be best understood by the student, if I begin at the top, and not at the bottom; and therefore I shall first ask your attention, in this lecture, to the Supreme Court of the United States.

This court, which may truly be said to be the greatest court in the civilized world,<sup>1</sup> considering its duties and powers, and the field in which it exercises them, — this court was established by the Constitution, and not by Congress; and if you refer to the first section of the third article of the Constitution, you will find the provision by which this court was established. I will read it to you:—

“The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.”

You will perceive that the Constitution establishes “one supreme court,” but leaves it for Congress to ordain and establish, from time to time, such inferior courts as it may think proper.

In this connection, before I come to the article which distributes the jurisdiction among the courts, it is necessary to read the second section of the third article, which determines to what subjects the judicial power of the United States shall extend; because you should bear in mind that, when this

<sup>1</sup> [“The Supreme Court of the United States is not only a most interesting, but a virtually unique creation of the founders of the Constitution. The success of this experiment has blinded men to its novelty. There is no exact precedent for it either in the ancient or in the modern world.” — *Sir Henry Sumner Maine.*]

Constitution was formed, it assumed that all judicial power, as well as all legislative and executive power, was vested in the several States; and this Constitution is a grant by the people of the States of certain powers to the national government, — and, among other powers, a grant of judicial power; and inasmuch as the States did not intend to abdicate their judicial power, but only to grant to the United States certain enumerated powers, of a judicial character, this second section of the third article declares what are the judicial powers granted by the Constitution. I will now read it: —

“The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects.”<sup>1</sup>

This describes and enumerates all the judicial powers of the United States. Congress cannot confer any more than these upon the courts of the United States.

It will be necessary in the course of these lectures to look with considerable minuteness into the differ-

<sup>1</sup> Revised Statutes, § 687.

ent parts of this section, and to specify the subjects which are here described, and distinguish between them. I only read it now that you may understand the next paragraph, which distributes this judicial power among the courts.

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party,<sup>1</sup> the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Here you perceive that the Constitution has made a distinction between original and appellate jurisdiction of the Supreme Court. You understand, doubtless, that "original jurisdiction" means, that, in the court which possesses it, a suit may be begun; and therefore, in these cases "affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party," the Supreme Court has original jurisdiction, and suits may be begun there. If, for instance, two States have a controversy upon the subject of boundary, or any other subject, that suit may be begun in the Supreme Court of the United States. So any case which arises affecting ambassadors, or other public ministers (I shall have occasion to speak to you as

<sup>1</sup> [This means, of course, those controversies already enumerated in the previous section, to which a State may be a party. It does not give the Supreme Court jurisdiction of every case in which a State is a party. Hence the Supreme Court has no jurisdiction of a suit between a State and citizens of the same State. *California v. Southern Pacific Company*, 157 U. S. 229, 257.]

to what is meant by "affecting" them), is a case for the original jurisdiction of the Supreme Court of the United States. In the other cases to which the judicial power of the United States extends, the jurisdiction of the Supreme Court is appellate only; the suits are not begun there; they are begun in some other courts; and it was left for Congress to determine what those other courts should be; and it did determine that they should be a Circuit Court and a District Court. Suits, therefore, in all cases except those which affect ambassadors, other public ministers, or consuls, and those in which a State is a party, are begun in one or the other of these inferior courts, and they go to the Supreme Court<sup>1</sup> by appeal or writ of error, as the nature of the case may require. I shall explain hereafter how that is.

Now, the question arose very early whether Congress could confer upon the Supreme Court any original jurisdiction besides that which is here described; that is, in cases affecting ambassadors, etc., or in which a State is a party. Congress had undertaken, by the Judiciary Act of September, 1789, to confer upon the Supreme Court of the United States other original jurisdiction; it became necessary for the court to decide whether that was a constitutional law; and it was held in the case of *Marbury v. Madison*, 1 Cranch, 137, that Congress could not confer on the Supreme Court any other original jurisdiction than that which was described and granted by the Constitution. You

<sup>1</sup> [The appeal, in some cases, lies now to the new court, the Circuit Court of Appeals. See *post*, p. 74.]

will find, on reading that case, — it is one of the great judgments of Chief Justice Marshall, not upon this point only, but covering a variety of subjects,<sup>1</sup>—you will find, on reading that case, that the court came to the conclusion that the affirmative words, that the Supreme Court shall possess this jurisdiction, naturally and properly included a negative, — that they should not possess any other; and the reasoning by which that conclusion was arrived at is perfectly satisfactory. So that you will rest in this conclusion, that the Supreme Court has conferred upon it the original jurisdiction described by the Constitution, and no other; and that Congress cannot confer upon it any other original jurisdiction.<sup>2</sup>

Then another question early arose, and it is a question which has never yet been finally determined; that is, whether Congress can confer upon either of the inferior courts, the Circuit Court or the District Court, any of this original jurisdiction which the Constitution says is to be conferred upon the Supreme Court. You will observe that the language of the Constitution contains no negative words; it only says that the Supreme Court shall

<sup>1</sup> [In this case it was held for the first time that an Act of Congress which conflicts with the United States Constitution is void.]

<sup>2</sup> Strictly speaking, Congress does not confer any original jurisdiction on the Supreme Court. All that it possesses was granted by the terms of the Constitution. The particular original jurisdiction which it was held in *Marbury v. Madison* that Congress could not confer on the Supreme Court was that embraced in the thirteenth section of the Judiciary Act of 1789, which had undertaken to empower the Supreme Court to issue writs of mandamus in cases other than those cases of original jurisdiction conferred on that court by the Constitution.

have this original jurisdiction, and that in other cases the Supreme Court shall have appellate jurisdiction from such courts as Congress may see fit to establish; but it does not say that Congress shall not confer the original jurisdiction given to the Supreme Court on other courts, and this is a question yet undetermined. If you refer to the case of the *United States v. Ortega*, 11 Wheaton, 467, you will find the question was raised there and left undecided; and, so far as I know, it is undecided to this day. The reasons which induced the Supreme Court, in the case of *Marbury v. Madison*, to say that the affirmative words carried a negative with them by implication, would lead me to think that Congress could not confer any of the original jurisdiction which is given to the Supreme Court upon the Circuit Court. But it is an open question; I merely indicate it in passing, in order that you may know there is such a question.<sup>1</sup>

But though the Constitution established the Supreme Court of the United States, it was still necessary that Congress should act to organize that court, and determine what should be its terms and its methods of business, its number of judges, their salaries, etc.; and this was done by the Act of September 24, 1789, which is found in the first

<sup>1</sup> [This question has since been decided in a manner contrary to the view expressed by Judge Curtis. In *Börs v. Preston*, 111 U. S. 252, it was held that consuls may be sued in the Circuit Court, like other aliens, and that the Act of Congress giving jurisdiction of suits against consuls and vice-consuls to the District Courts is constitutional. See Revised Statutes, § 563, cl. 17, and § 687. The State courts also are now at liberty to take jurisdiction of such suits. See Act of February 18, 1875, 18 Stat. 318.]



volume of the Statutes at Large, pp. 78-93. The first section of this act reads thus:—

“That the Supreme Court of the United States shall consist of a Chief Justice and five Associate Justices, any four of whom shall be a quorum, and shall hold annually, at the seat of government, two sessions, the one commencing the first Monday of February, and the other the first Monday of August. That the Associate Justices shall have precedence according to the date of their commissions, or, when the commissions of two or more of them bear date on the same day, according to their respective ages.”<sup>1</sup>

At the present time there are nine judges, there is one term instead of two, and that term begins on the second Monday of October. But the urgency of the business of the court is such that, for quite a number of years past, they have held an adjourned session, commencing usually, as it did this year, in October, — the second week in October; so that, practically, the court is in session about six months, or six months and a half, in a year. They adjourn commonly early in the month of April, in season for the judges to go on the circuits; during the residue of the year, — from the middle of October to the middle of April, — they are in session.<sup>2</sup>

<sup>1</sup> The organization of the Court is now regulated by Chap. IX., Title XIII., of the Revised Statutes. There are a Chief Justice and eight Associate Judges, any six of whom constitute a quorum.

<sup>2</sup> The meaning of this passage is, that the regular term of the court commences in the second week of October, and the term is ended about the middle of April; but that, before the law directing this earlier commencement of the regular term, there had sometimes been adjourned terms, commencing in October. See Revised Statutes, § 684.

The other section which relates to the establishment of the court is the thirteenth, and that is the section which, under the Constitution, confers on the court its jurisdiction, both original and appellate; and in the course of conferring it, Congress, as I have said, went beyond its authority, and gave the court more original jurisdiction than Congress could confer; and, in the case of *Marbury v. Madison*, to which I have referred, the court decided that, as to such additional original jurisdiction, it was not constitutional law, and they could not exercise that additional jurisdiction.<sup>1</sup>

Now, turning back to the second section of the third article of the Constitution, allow me to read: "The judicial power shall extend to all cases, in law and equity." In the first place, What is meant by "cases"? That you will find was discussed, and there is an opinion of Chief Justice Marshall thereon, in *Osborn v. The Bank of the United States*, 9 Wheaton, 738. The conclusion to which the court came, and substantially the definition which was there given, is, that a "case," within the meaning of the Constitution, is a subject on which the judicial power is capable of acting, and which has been submitted to it by a party in the forms required by law. That is what is meant by the Constitution when it speaks of all "cases." It is a subject on which the judicial power is capable of acting, and which has been submitted to it by a party — that is, one who is interested in the subject — in the forms required by law.

<sup>1</sup> The thirteenth section of the Judiciary Act is now embodied in Chap. XI, Title XIII., of the Revised Statutes, omitting the clause which was declared to be unconstitutional.

Then follows "in law and equity." That has been decided to refer to the known division existing at the time the Constitution was formed, under the English system of jurisprudence, between the common law and the equity law; and this distinction is preserved throughout in the practice and proceedings of the United States courts; and it is of no moment whatever in those courts that some of the States have abolished this distinction. The States can pass no laws which affect either the jurisdiction or the practice of the courts of the United States, *proprio vigore*.<sup>1</sup> Those laws may be adopted by Congress, or, in the absence of any law of Congress, some of them may be adopted by the courts themselves, by rules; but, *proprio vigore*, by their own force, State laws have no operation whatever on the courts of the United States. The abolition of the distinction between law and equity, for instance, to a certain extent, in the State of New York and some other States, has no operation in the courts of the United States.<sup>2</sup> There, as you will see hereafter, if you are not already informed of it, the practice at law and in equity is perfectly distinct, just as much as it was in England at the time when the Constitution was formed; and the equity practice of the courts of the United States is the same everywhere in the United States, and they administer the same system of equity rules and equity jurisprudence through the whole of the United States, without regard to State laws. The State laws are operative, as rules of decision, in

<sup>1</sup> [*Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 579.]

<sup>2</sup> [*Potts v. Accident Insurance Co.*, 35 Fed. Rep. 566.]

trials at law, because Congress has so enacted in the thirty-fourth section of the Judiciary Act, but not in trials on the equity side of the court.<sup>1</sup>

Then comes, after the words I have read, "all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." That is, the judicial power of the United States may extend to all cases in law and equity arising under this Constitution. Any case which depends, in part or in whole, upon this Constitution, any case which depends, in part or in whole, upon the laws of the United States, or any treaty made by the United States, comes under the judicial power, and under the jurisdiction which has been, or may be, conferred upon the courts by Congress.

Then comes the language, "to all cases affecting ambassadors, other public ministers, and consuls;" and a question arose, many years ago, concerning the meaning of that word "affecting." What is a case that "affects" an ambassador? The case is *United States v. Ortega*, already referred to (11 Wheaton, 467), in which the court held that an indictment for an assault upon a public minister was not a case "affecting" that minister, within the meaning of the Constitution. And there is a more recent case, in the 13th of Wallace, 581, where the same word occurs in a recent Act of Congress, and the court has reaffirmed the opinion

<sup>1</sup> See Revised Statutes, § 721; and note the language and the limitations of this rule. See also Memoir, &c. of Judge Curtis, Vol. I. pp. 203, 204, 209, 210.

in the 11th of Wheaton. In that case the question was, whether the right of a negro to be a witness in the State of Kentucky, where he had been previously disqualified, was a case "affecting" that witness, and the court held that it was not. The witness was not affected by the case, whether he was admitted to testify or excluded from testifying; that was no affair of his.<sup>1</sup>

The next phrase here which requires examination is, — "to controversies to which the United States shall be a party; to controversies between two or more States," etc. Under these words, it has been held that it is not sufficient that a State is interested in the suit; a State may be even *exclusively* interested in a suit, and yet it would not be a suit in which the State is "a party," within the meaning of the Constitution. Quite a number of decisions have been made on this point. I will refer you to two leading cases. The first is *The Bank of the United States v. The Planters' Bank*, 9 Wheaton, 904, and the second is *Osborn v. The Bank of the United States*, in the same book, page 738. In the first of these cases, the State owned all the stock in a bank which it had established, and the question was whether, where a suit was brought either for or against such a bank the State was "a party," within the meaning of these words of the Constitution; and it was held that the State was not a party, that it must be a party on the record, and that it was not sufficient that the State was even *exclusively* interested in the subject-matter of the suit. In the case of *Osborn v. The Bank of the*

<sup>1</sup> *Blyew v. The United States*, 13 Wallace, 581.

*United States*, a tax-collector in Ohio, being of course a State officer, had undertaken to collect a tax from the Bank of the United States, which was provided for and levied upon that bank for the avowed purpose of driving that branch of the bank out of the State. The court held that the act was unconstitutional, and that the State was not a party; for although its officer, Mr. Osborn, was to collect this money for the benefit of the State, and although the injunction against him which stopped its collection must prevent the money from going into the treasury of the State, and the State was thus exclusively interested, nevertheless the State was not a party upon the record, and therefore was not within the meaning of the language of the Constitution.<sup>1</sup>

This language — “to controversies between two or more States” — requires no particular comment. One State may sue another State in the Supreme Court, under its original jurisdiction, either on a question of boundary<sup>2</sup> or any other question. Questions of boundary have been of more frequent occurrence; but there have been suits brought by

<sup>1</sup> [The ground of this decision, as here stated by Judge Curtis, has since been disclaimed by the Supreme Court. It is now held that a State may be a party to a suit, although not a party upon the record; and the decision in *Osborn v. The Bank of the United States* is defended solely upon the ground that the defendant was a wrong-doer, a trespasser, who had taken money from the bank unlawfully; and this specific money was recovered from him. If the money had been paid into the treasury and mixed with other money of the State, it could not have been recovered in any form of action. See *In re Ayers*, 123 U. S. 443, 487.]

<sup>2</sup> [Such a case is *Iowa v. Illinois*, 151 U. S. 238.]

one State against another of a different character. It matters not what the character of the suit is; if it is brought by one State against another, the Supreme Court of the United States has original jurisdiction.

“Between a State and citizens of another State.” Well, under that language, it was held by the Supreme Court, immediately after the Constitution was formed, that a citizen of Massachusetts, for instance, could sue the State of Rhode Island, or any other State. That caused great dissatisfaction.<sup>1</sup> State sovereignty in those days was looked upon as more sacred, perhaps, than it is now. At all events, that interpretation which was placed upon the Constitution by the Supreme Court was a subject of great complaint; and the result was the eleventh amendment to the Constitution, which is as follows:—

“The judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.”

Therefore, this eleventh amendment withdraws the States from any liability to a suit by an individual, whether a citizen of another State or a citizen of a foreign state, but it leaves the State to be sued by another State,<sup>2</sup> and it leaves the State

<sup>1</sup> The reference here is to the case of *Chisholm v. The State of Georgia*, 2 Dallas, 419.

<sup>2</sup> [A State may also be sued by the United States, and the Supreme Court has exclusive jurisdiction of such a suit. *United States v. Texas*, 143 U. S. 621.]

also to be sued by a foreign sovereign.<sup>1</sup> A foreign citizen or subject cannot sue a State; but a foreign sovereign, as, for instance, the Queen of England, may bring a suit against the State of Massachusetts, or any other State in the Union, in the Supreme Court of the United States.<sup>2</sup> A State, however, is capable of suing citizens of other States, although not suable by them, and such suits have not been unknown. You will find one, and it is a leading case, in the 7th of Wallace, 700, — *The State of Texas v. White*, — where the State of Texas brought suit against certain parties in the Supreme Court for the purpose of enjoining the negotiation of State bonds, a large amount of which had passed out of the control of the State officers during the confusion and trouble in that State; and the State obtained an injunction, and finally, under a decree of the Supreme Court, obtained the bonds themselves, to a large amount. I refer to it as an instance in which a State, under the Constitution, exerted its authority to bring a suit in that court against individuals.

<sup>1</sup> The term "foreign state," in this part of the Constitution, does not comprehend any Indian nation within the territorial limits of the United States. *The Cherokee Nation v. The State of Georgia*, 5 Peters, 1. Nor does it comprehend any Indian tribe or nation resident in the British dominions and under the pupillage of the Crown. See Memoir, &c. of Judge Curtis, Vol. I. p. 282.

<sup>2</sup> I once advised a representative of the Queen (The Governor-General of Canada) that such a suit might be brought to ascertain the liability of the State of New York to certain tribes of Indians settled in Canada. There were obvious reasons why the Queen, at that time, should not become a suitor in our Supreme Court. But the time may come when such a suit may be brought. — B. R. C. See the opinion given by Judge Curtis in his Memoir, &c., Vol. I., and his article on the State Debts, in Vol. II. of the same work.



I have gone through all I desire to say upon the subject of the jurisdiction of the Supreme Court, and I will now ask your attention for a few moments to the practice of that court in the exercise of its original jurisdiction, because you will find that the practice of the Supreme Court under its appellate jurisdiction is something entirely different from its practice under its original jurisdiction. There is no Act of Congress regulating the practice of the Supreme Court under its original jurisdiction; but the third rule of the Supreme Court respecting its own practice is in these words: —

“This court considers the former practice of the Courts of King’s Bench and Chancery in England as affording outlines for the practice of this court; and will from time to time make such alterations therein as circumstances may render necessary.”

That is a very old rule, made by the court immediately after its organization, and rules have been from time to time made by the court, under what it considers to be its power in the absence of an Act of Congress, in regard to a variety of subjects occurring in the course of its original jurisdiction. I shall have occasion to refer to some of them.

The most important class of cases under this original jurisdiction — indeed, the only class which has been of any practical importance thus far in the history of the court — has been suits between States, or between a State and citizens of another State. I do not know that I can refer to any rule of the court, or to any decision which has fixed any rule by which the proceedings in such cases are abso-

lutely regulated, but the general understanding is, and the general practice — so far as I know, the universal practice, except in one or two very early cases — has been to resort to a bill in equity, and it is under the forms of proceeding in equity that this original jurisdiction for a great many years has been exercised. So that, when a State has had occasion to bring a suit, it has filed a bill in which it states its case in the same form, and under the same rules of pleading, as if it were suing in a court of equity, and there is a demurrer, or a plea, or an answer, or whatever is deemed to be a proper defence, regulated by rules of practice similar to those which would regulate the same suit if it were in the Circuit Court or a State court in equity, where equity practice was known. You may therefore safely take it that in all cases between States, or between a State and an individual, where this original jurisdiction is to be exercised, unless it is a case in which the common law would afford a plain, adequate, and complete remedy, you are to file a bill in equity, as if you were prosecuting a claim in an equity court.<sup>1</sup>

It is not to be forgotten that the original jurisdiction of the Supreme Court extends to cases both in law and equity; and that the division between the two systems is just as sharp and clear when this original jurisdiction is appealed to as when application is made to an inferior court, and that in cases remediable by the common law, plainly and adequately, the remedy sought must be by the forms

<sup>1</sup> [The procedure in cases of original jurisdiction is touched upon in *California v. Southern Pacific Company*, 157 U. S. 229.]

of the common law in the Supreme Court as well as in the inferior courts.

I perhaps might mention here, in passing, though it is not a point of very much importance, that a suit against the Governor of a State, in his official capacity, is deemed by the court to be a suit against the State.<sup>1</sup> I should also mention, as a point of more importance, that the practice of the court requires that leave should be obtained before a bill is filed. Ordinarily, in a court of equity, you file your bill as a matter of right; but the practice in the Supreme Court of the United States has always been to apply to the court on motion to obtain leave to file the bill. Whether that is by reason of the dignity of the parties, the importance of the subject-matter, or what not, I do not know, but the practice early obtained, and has always been adhered to. You will find it stated in the case of *The State of Georgia v. Grant*, 6 Wallace, 241, where the Chief Justice says that it is necessary to obtain that leave.

The question early arose how notice was to be given of a suit against a State, and on whom process was to be served. That was disposed of by a rule which the court adopted, and which is Rule 5. "All process of this court shall be in the name of the President of the United States. When process at common law or in equity shall issue against a State, the same shall be served on the Governor or chief executive magistrate, and Attorney-General of such State."

<sup>1</sup> *Commonwealth of Kentucky v. Dennison*, 24 Howard, 66; *Governor of Georgia v. Madrazo*, 1 Peters, 110.

That is the mode in which service of the process must be made.<sup>1</sup>

Now, as a practical matter, I state to you, that all suits under the original jurisdiction of the Supreme Court are entered by the clerk on a separate docket, which is called "the original docket," and these cases are kept distinct from the cases which come there by appeal or writ of error. This original docket is a thing by itself, and all proceedings in these cases on the original docket are on motion. No case is heard, unless the court makes a special order to have it heard. No proceeding takes place in any of these original cases without a special order. If, for instance, a suit is brought by Virginia against West Virginia, as there was such a controversy not long since, the State of Virginia has to obtain leave to file a bill, to obtain process and have it served, and so get the State of West Virginia before the court.<sup>2</sup> The next thing is, to obtain from the court an order that West Virginia answer. That is done on motion, by a special order, and the time is fixed. Every step that is taken in the case is on some special motion. That, I suppose, is on account of

<sup>1</sup> *New Jersey v. New York*, 5 Peters, 283. If a State fails to appear in obedience to the summons of the court, no compulsory process will be resorted to, but the suit will proceed *ex parte*. *Rhode Island v. Massachusetts*, 12 Peters, 657.

<sup>2</sup> The case of *Virginia v. West Virginia*, reported in 11 Wallace, 39, was a case of boundary. It was held that the original jurisdiction of the Supreme Court was not defeated because, in deciding the question of boundary, it was necessary to consider and construe contracts and agreements between the two States, nor because the judgment or decree of the court might affect the territorial limits of the jurisdiction of the States.

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the dignity of the parties, the nature of the agencies they must employ, and the importance of the subject-matter involved.

I think I have now gone through with all that is needful for me to say to you at this time in regard to the original jurisdiction of the Supreme Court, its extent, and the manner in which it is exercised. In the next lecture, I shall speak to you concerning the appellate jurisdiction, as regulated by Congress, on writs of error and appeals, and other special modes of procedure.

## CHAPTER II.

THE SUPREME COURT (*continued*).

YOU will remember, gentlemen, that in the last lecture I endeavored to show that the Supreme Court of the United States was constituted by a provision in the Constitution of the United States, not by Congress; that its jurisdiction was divided into two distinct parts, its original and its appellate jurisdiction; and I further explained, or endeavored to explain, how this original jurisdiction is exercised, as well as what is its extent. In this lecture I desire to speak of the other branch of the jurisdiction of the Supreme Court, — its appellate jurisdiction. You will remember, I explained the distinction between these two classes of cases, — the one depending upon the original, and the other upon the appellate jurisdiction. The Supreme Court's original jurisdiction allows you to begin a suit there; it has appellate jurisdiction, when you must institute a suit in some other court, and carry it to the Supreme Court by some process provided by law.

The subject of this lecture is the appellate jurisdiction of the Supreme Court; and this is divisible into two parts, distinct the one from the other,

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because the jurisdiction in one class of cases is exercised over courts of the several States; in the other class of cases it is exercised over courts of the United States.

It may seem somewhat surprising that, although the Constitution of the United States has not in terms granted to the Supreme Court appellate power, in reference to courts of the several States, nevertheless such a power exists; and I may mention to you, in passing, — although this is not a lecture upon the Constitution of the United States, nevertheless the matter is incidentally connected with the subject upon which I am speaking, — I may mention, I say, in passing, that at an early day, and especially in the State of Virginia, all appellate power of the Supreme Court of the United States over courts of the several States was not only seriously questioned, but absolutely denied; and it required a repetition of instances, in which the Supreme Court of the United States vindicated its authority over courts of the several States, within certain well-defined limits, to convince the country that this power existed. It may not be inappropriate for me, in a few words, to call your attention to the source of this power. It is only an implied power, but its implication is necessary, and the reasons for it are satisfactory. Its source will be found in the second clause of the sixth Article of the Constitution: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

The question at once arose, how this Constitution, these treaties, and these laws could be the supreme law throughout the United States, unless the judicial power of the United States could take cognizance of all questions arising under them, and give final effect to them. This entire subject in all its bearings you will find discussed, with great ability, in the cases of *Martin v. Hunter*, 1 Wheaton, 304, and *Cohens v. The State of Virginia*, 6 Wheaton, 264, in which the Supreme Court, with decisive effect, — I say decisive effect, because the country has always since that time acquiesced, — vindicated its jurisdiction over the courts of the several States in a limited class of cases.

That jurisdiction was derived from an act of Congress, — as indeed all appellate jurisdiction must be under the Constitution, because it is provided in the Constitution that the Supreme Court shall have certain original jurisdiction (as I explained in the last lecture), — and “in all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress may make.” “In all the other cases,” — that is, in all other cases that have been previously described, — not in *all* cases, but in all other cases previously described, — they shall have appellate jurisdiction, “with such exceptions, and under such regulations, as the Congress may make.”

Now, immediately after the organization of the government, there was passed, on the 24th day of September, 1789, what has been always since



known as the "Judiciary Act," and perhaps the most important section of that act, certainly one that has had very great influence on the country through the judiciary, and which was absolutely essential to carry on the government of the United States as it was established by the Constitution, was the twenty-fifth section. I will read that section, because every part of it requires consideration:—

"That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission, — may be re-examined, and reversed or affirmed, in the Supreme Court of the United States upon a writ of error." <sup>1</sup>

<sup>1</sup> The twenty-fifth section of the Judiciary Act of 1789 is now embodied in § 709 of the Revised Statutes, with some slight changes of phraseology, and some additional clauses. The substance, however, of this organic law remains the same. The modifications

There you will perceive that, under the provision of the Constitution that Congress may regulate the appellate power of the Supreme Court, authority is given to the Supreme Court to send a writ of error to the highest court of the State to which one of the questions here described could be carried by a writ of error, and such question is to be brought up to the Supreme Court of the United States, to be there examined, and reversed or affirmed.

It will be necessary, in the progress of our examination of this important section, to notice the class of questions which may be thus transferred to the Supreme Court of the United States.

were first introduced by an act passed February 5, 1867. As the law now stands, under the provisions of the last-named act, incorporated into the Revised Statutes, the Supreme Court of the United States may review the final judgment or decree of the highest court of a State in which a decision could be had, in three classes of cases:—

1st. Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity.

2d. Where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.

3d. Where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority.

Any enactment, from whatever source originating, to which a State gives the force of law, is a "statute" of the State, within the meaning of the law which regulates the appellate jurisdiction of the Supreme Court over the judgments and decrees of the State courts. *Williams v. Bruffy*, 96 U.S. 176; *Ford v. Surget*, 97 U.S. 594.

Now, there are certain requirements here, each of which demands attentive consideration. The act says, "a final judgment." Only a *final* judgment can thus be examined, and the reason for this is apparent. Suppose, for instance, that, in a suit in a State court, a defendant sets up a provision in the Constitution of the United States, — such, for instance, as that provision which has so often been relied upon, that the State law under which the suit is brought, or upon which it depends, violates the obligations of a contract, and therefore it was not within the power of the State to pass such a law; or suppose the defendant says it is an *ex post facto* law, or relies upon any other limitation on the power of a State made by the Constitution. He sets that up in his defence, and the lower court decides against him; he must not stop there, because, if he carries the case to a higher court, they may decide in his favor, and it may be wholly unnecessary to go beyond the judicial power of the State to have the question properly decided. It is therefore only "a final judgment" of the highest court of the State to which the party has the power to carry the question. There have been a great many decisions made upon the question of what judgment is "final," and what is not. They have more often been made under those provisions of the Judiciary Act which relate to the Circuit Courts of the United States, where the same requirement is found. Judgments of the Circuit Courts can be carried to the Supreme Court only when they are final, and under that clause of the statute a great many decisions have been made; not so many under.

the twenty-fifth section, which contains the same requirement; but if you will look at the case of *Houston v. Moore*, 3 Wheat. 433, you will find a decision upon these words of the statute requiring the judgment to be final.<sup>1</sup>

The next words are, "final judgment or decree in any *suit*." Well, it has been a subject of discussion, What is a "suit," within the meaning of this law? and that was settled in the case of *Weston v. The City of Charleston*, 2 Peters, 464. The conclusion reached was, that it is any proceeding in a court of justice by which a remedy is sought for a right. It is not necessarily a proceeding according to the course of the common law or equity law; it may be a proceeding under a State statute. Under a State statute, for instance, there may be a particular mode of proceeding in order to try a right; and a proceeding under such a statute, however it may differ from the usual modes of proceeding, is a "suit," within the meaning of this section.<sup>2</sup>

The next requirement is, that it must be a final judgment of the highest court of law or equity in which a decision can be had. I have already explained the reason for that, — because it might be unnecessary to go beyond the judicial power of a State to get the proper interpretation of the Constitution, or treaty, or statute in question; and until you have the decision of the highest court of

<sup>1</sup> [See p. 93, *infra*, where this subject is treated more fully in connection with appeals and writs of error taken from or to the inferior Federal Courts. *St. Clair County v. Lovington*, 18 Wallace. 628; *Parcels v. Johnson*, 20 *Ibid.* 653.]

<sup>2</sup> [See also *Kohl v. United States*, 91 U. S. 367, 375.]

the State, and that decision is against the right thus claimed, you have no occasion and no power to appeal to the Supreme Court of the United States.<sup>1</sup>

What is "the highest court" of course depends entirely upon the laws of the State; but the details of the State law cannot prevent any party, whatever the form or mode of proceeding may be, from getting this remedy, if he claims a right under the Constitution, treaties, or statutes of the United States, or any authority exercised by virtue of either.<sup>2</sup>

There are many cases arising under the laws of the States, in which a question can be carried to a higher court, and the record of the suit does not go there. For instance, in the Supreme Court of Massachusetts, a case is carried from a term of the Supreme Judicial Court, which sits for a county, to what we call the full court, the court for the Commonwealth, and enough of the proceedings is sent up for that court to see what question is to be decided; when they have made a decision, they send a rescript to the lower court, informing it what the decision is, and in many cases directing them what judgment or order to enter in the case;

<sup>1</sup> In the Revised Statutes, the words are "the highest court of a State," omitting the words "of law or equity," apparently upon the idea that they are superfluous, or because the courts of many of the States now exercise both law and equity powers.

<sup>2</sup> What is requisite is, that the highest court should be the one that has power to make a final decision; and this may be an inferior court, if the highest court of all could not have jurisdiction. *Miller v. Joseph*, 17 Wallace, 655. See also *Cohens v. Virginia*, 6 Wheat. 264.

but, all the time, the record remains in the lower court, and in case a writ of error is to be taken, inasmuch as the record remains in the lower court, and it is a copy of the record which is to be sent up under the writ of error, the writ of error must go to that lower court, where the record remains. It may remain in the Superior Court in Massachusetts, it may remain in the Supreme Court for the county; but wherever the record is found, there the writ of error is to go, in order to bring up the record. You will find some decisions on this subject, which may be interesting to you, in the case of *Gelston v. Hoyt*, 3 Wheaton, 246, and *Kanouse v. Martin*, 15 Howard, 198.

Passing beyond these points, we come to the grounds of jurisdiction; that is, the grounds upon which the Supreme Court may take and exercise jurisdiction. They are specially described in the statute: "Where is drawn in question the validity of a treaty, or statute, of the United States, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of a State, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States,<sup>1</sup> and the decision is in favor of their validity; or where is drawn in question the construction of any clause of the Constitution of the United States, or of a treaty, or statute of the United States, or com-

<sup>1</sup> [The question whether a statute of a State conflicts with the Constitution of that State does not come within this act. *Mitchell v. Clark*, 110 U. S. 633]

mission held under the United States.”<sup>1</sup> In all these cases, the party who has set up any right, privilege, or exemption by reason of the Constitution, laws, or treaties of the United States, and the decision is against him, or where he has asserted that a State law is not binding, because it is in conflict with the Constitution of the United States, and the decision is in favor of the State law,<sup>2</sup> then he may have the subject reviewed in the Supreme Court of the United States.

Now, the first inquiry is, How shall it be made to appear to the Supreme Court of the United States that one of these things has been drawn in question, and that a decision has been reached such as is described in this section, for or against the privilege claimed, according to the nature of that privilege?

On this point very grave difficulties have been encountered, and a great number of decisions made. I will endeavor to state to you a few rules, which I think will afford sufficient guides in the inquiry whether either of these questions can be made to appear to the Supreme Court of the United States to have been drawn in question. And I must state,

<sup>1</sup> [This clause now reads as follows: “or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States.” Rev. Stat. 709. See pp. 46-58, *infra*.]

<sup>2</sup> [It is important for the student to remember that in every case the decision must be against the right or immunity set up under the United States Constitution, laws, or treaties. The fact that such a jurisdictional or “Federal” question is raised, and is decided wrongly by the State court, is not sufficient to give the United States Supreme Court jurisdiction. The right, etc., must be decided against the party setting it up. *Murdock v. Memphis*, 20 Wall. 590, 626.]

in the first place, that, in acting on the writ of error, the Supreme Court have before them only the record of the State court. They have nothing before them except the record, which includes — as you know — the pleadings and the verdict and judgment, if it is a case at law; and if there has been a trial by jury, the bill of exceptions, if any exceptions were taken, showing what points were made at the trial, and what the rulings of the court below were upon them; and that bill of exceptions becomes, when properly taken and allowed, a part of the record. In equity, they have the bill, the answer, the replication, the evidence, and the decree, or decrees, if there were more than one. These are the records in law and in equity, and they are before the Supreme Court of the United States, from the State court, for them to examine, and thus determine whether any one of these questions has arisen, which is described in this twenty-fifth section.<sup>1</sup>

Now, after the case is entered upon the calendar of the Supreme Court, if the opposing counsel, upon examination of the record, thinks it is doubtful whether the court has jurisdiction, because he thinks it is doubtful whether either of the questions designated in the twenty-fifth section has arisen, he is at liberty, on any motion day, to file a motion to dismiss the writ of error upon the ground that it does not disclose any question over which the court has jurisdiction; that motion is heard as a preliminary question; and if the court, on looking into

<sup>1</sup> [The record now includes the opinion of the court. See p. 48, *infra*.]



the record, find no question there, under the twenty-fifth section, they dismiss the writ of error. On the other hand, if no such motion is made, and the case comes to a hearing on its own merits, if the court then find, on their own examination, that there is no question under the twenty-fifth section over which they have jurisdiction, they, *ex mero motu*, dismiss the writ of error; they are careful not to exercise jurisdiction in any case unless it has been given to them by some Act of Congress, their whole appellate jurisdiction being regulated by Congress.

In what way is it to be made to appear on the record that a jurisdictional question has arisen? How will you have the record framed, so that it shall be made to appear to the Supreme Court of the United States, when the record goes there on a writ of error, that one of these questions has arisen? Suppose, for instance, that a suit is brought on a contract. A State law is set up, which, in effect, has done away with the contract, or modified it in such a way that the action would not lie in conformity with the State law; but the promisee of that contract, the person contracted with, insists that this State law is invalid, because it impairs the obligation of his contract. In what way will you get that question on the record, so that it can be carried to the Supreme Court of the United States?

There are various ways, depending upon the nature of the proceeding. If it be an action at law, and there is a trial by a jury, you request the judge to instruct the jury, as a matter of law, that this State law has impaired the obligation of that

contract, and therefore is invalid, under the Constitution of the United States, and is to be disregarded by them. If he gives the instruction, of course he is bound to carry it out, and see that the jury do so; and if they find a verdict contrary to his instructions, he is bound to set it aside. On the other hand, if he refuses to give the instruction, if he says, "My opinion is, that this State law does not impair the obligation of that contract, and therefore is not invalid under the Constitution," you may take your exception to that ruling; he signs and seals that exception; it becomes a part of the record; and when the case comes before the Supreme Court of the United States, there is on the record the evidence that that question was raised, and decided by that court. You may have been obliged to carry it to a higher court, to get their decision; but that is the way you get it on the record in an action at law, by a request for instruction, a refusal of the request, and then the question whether the request was rightly or wrongly refused, may be carried to the Supreme Court. On the other hand, in a suit in equity, if the complainant has a case where he wishes to raise such a question, the bill itself, by the proper averments and charges, can raise the question, or, if the defendant intends to raise such a question, he can do it in his answer. And in the decree there always should appear, if there is such a question in the case, evidence that it was raised, that it was decided, and how it was decided.

I ought to say here that, although it is the dictate of prudence, and a very obvious one, where

it is intended to carry a question of this kind to the Supreme Court of the United States, to take the measures I have spoken of, — to place upon record the fact that the question was made and decided, and how it was decided, — nevertheless, it has been settled that it is not necessary that the record should in terms state these things. It is only necessary that, when the court look into the record, they should find that, by necessary intendment, as it is called, — that is, by the natural and necessary meaning of what they read, — there was such a question raised, and that it was decided, and how it was decided. This subject was a great deal discussed in the case of *Furman v. Nichol*, 8 Wallace, 44; so that if you are unfortunate enough to have any record which does not in terms state that one of these questions was raised, still, if you can satisfy the court that it was a necessary intendment that the State court could not have arrived at the result they did without coming in conflict with the Constitution of the United States, that may be sufficient. And perhaps I ought to say that different judges have, at different times, attempted to make an enumeration of the different modes in which the record may show that such questions arose, and it may be very well for you to look at two of the leading cases on that subject. The first is *Crowell v. Randell*, 10 Peters, 368, where Mr. Justice Story endeavored to enumerate the different modes in which the record may show that one of these questions arose, without stating it in terms; a later case is *Armstrong v. The Treasurer of Athens County*, 16 Peters, 281.

In this connection, I wish to ask your attention to a state of things which has given rise to many embarrassments in the Supreme Court. We will suppose a case where the record shows that a question was raised, under the twenty-fifth section, and that the highest court of the State decided against the right, or title, or claim, which was made under the Constitution, or treaties, or statutes of the United States; there is no doubt about that, and there is no doubt that they decided wrongly; and if the case turned wholly on that question, the judgment must be reversed, and the case sent back to be proceeded with, in conformity with the opinion of the Supreme Court. But now let us suppose that in that case there is a question of State law, — not one of these questions, under the twenty-fifth section, but a question of the local law of the State, and that the case might turn on that question, as well as on the other; that, even if the other was decided wrongly, there is a question of State law in the case, over which the highest court of the State has the ultimate control, on which they could have decided the case just as they did decide it, and enter the same judgment which was entered. Well, under that state of things, the Supreme Court have held that they cannot reverse the judgment, because it would be useless. If they reverse the judgment, and send the case back, the State court may say: "Well, we were wrong about that question of United States law, but here is another question upon which the judgment depends; we are right about that, and we will enter the same judgment we did before." That has occurred more than

once, and it is now settled, as you will find by looking at the cases of *Neilson v. Lagow*, 12 Howard, 98, and *Maguire v. Tyler*, 8 Wallace, 650, that on that state of facts the Supreme Court will not reverse the judgment.<sup>1</sup>

But then there is another posture in which a case may come there, which is more embarrassing. We will suppose that, as in the other case, there was a question under the twenty-fifth section appearing on the record, which the State court decided wrongly; they did not give due effect to the Constitution, the treaty, the Act of Congress, or the authority claimed under the United States; but the counsel in argument in the Supreme Court say, "Here is another question, under the State law, which might be raised;" they do not show that it was raised; they do not show that the State court proceeded upon that other question; but they simply say, "Here is a question of local law, and the court below might have proceeded upon that; *non constat* but they did proceed upon it; and they had a right to decide that question, and they had a right to enter this judgment, if they thought that question ought to be decided in a particular way." Now these cases to which I have just referred settle that, if it does not appear on the record that the State court did in truth decide on that question of local law, the Supreme Court will presume that they did not decide upon that question, provided the decision would be wrong in the judgment of the Supreme Court.

In the first of these cases — *Neilson v. Lagow*

<sup>1</sup> See the case of *Keith v. Clark*, 97 U. S. 454.

— there was a question under the twenty-fifth section. The Supreme Court held that the State court had not rightly interpreted the Act of Congress, and therefore that the judgment should be reversed. “But,” said the counsel for the defendant in error, “this deed which is relied upon by the plaintiff in error is not a deed that will carry a fee, according to the laws of Illinois; for the word ‘heirs’ is not mentioned in it, and therefore it may be that the Supreme Court decided this case in favor of the defendant below, by reason of that defect in the deed.” The Supreme Court looked into that question of local law; they were satisfied that the insertion of the word “heirs” was not necessary, according to the local law, in that particular case, it being a conveyance to a trustee, who had duties to perform which required him to take a fee; therefore they said, “We will not believe, in the absence of direct evidence, that the court below decided this case on that question, because, if they did, they decided it wrong, and therefore we shall consider that no such decision was made.”<sup>1</sup> This, I believe, will put you in possession of these two points in regard to a case turning possibly on local law, in which case the highest court of the State of

<sup>1</sup> [The converse of *Neilson v. Lagow* is found in *Klinger v. State of Missouri*, 13 Wall. 257. There, as in *Neilson v. Lagow*, two questions were involved, one question under the twenty-fifth section, and another question relating to common law; and it did not appear upon which question the State court had based its judgment. But in this case the Supreme Court found that a right decision of the common-law point involved would justify the judgment of the State court, and accordingly the writ of error was dismissed. See also *Johnson v. Risk*, 137 U. S. 300, 307.]

course has authority to determine, and which, ultimately, the Supreme Court of the United States has no authority to determine, when it comes from the State court, unless there has been a change in the legislation of Congress, to which I shall presently ask your attention, but which need not be considered in this connection.

There is one other thing which you ought to notice, and that is, whether it is necessary for the record to show that there was pointed out to the State court the particular Act of Congress, or particular clause in the Constitution, or particular clause in the treaty, on which reliance is placed; or whether it is sufficient to have the record show, generally, that some Act of Congress, or some treaty, or some provision of the Constitution, was relied upon. I am sorry to say that the decisions upon that subject are conflicting, and it will remain for the Supreme Court to endeavor to reconcile them, or overrule some, or affirm others. The only thing I can do to assist you on the subject is to give you a reference to the two classes of cases. There is one class of cases which affirms that you must bring to the notice of the State court the particular Act of Congress on which you rely: *Maxwell v. Newbold*, 18 Howard, 511; *Farney v. Towle*, 1 Black, 350; *Messenger v. Mason*, 10 Wallace, 507. They are in the affirmative of the proposition, — that the record must show that the particular clause of the law, treaty, or Constitution was brought to the notice of the court. On the other hand, so far as respects the Constitution of the United States, the record need not show that the particular clause was

brought to the notice of the court, as in the cases of *Bridge Proprietors v. Hoboken Company*, 1 Wallace, 116, and *Furman v. Nichol*, 8 Wallace, 44, to which I have already referred for another purpose.

Perhaps a solution of the question may be found by inquiring in each case whether the record satisfactorily shows that one of the jurisdictional questions was raised and decided, and how decided.<sup>1</sup> It would generally be difficult to make these appear without evidence what statute, treaty, or constitutional provision was brought to the attention of the court, and relied on; but, as in the case of *Furman v. Nichol*, it is not impossible, and so not technically and always necessary.

Many decisions have been made upon the words, "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States." The decisions on this subject are so numerous that perhaps the best I can do will be to refer you to Curtis's Digest, p. 273, near the bottom of the page, where you will find the title under which these cases are collected.

You should notice that the writ of error to the State court, under the twenty-fifth section, includes criminal<sup>2</sup> as well as civil cases, and is wholly irrespective of the amount in controversy. When you come to look at the appellate jurisdiction of the

<sup>1</sup> [The suggestion here made is a good statement of the law as it is now laid down. See *Roby v. Colehour*, 146 U. S. 153, and p. 54, *et seq.*, *infra*.]

<sup>2</sup> [*Twitchell v. The Commonwealth*, 7 Wall. 321; *Bonahan v. Nebraska*, 125 U. S. 692.]



Supreme Court over the Circuit Courts and District Courts, you will find it limited by the amount in controversy. There is no such limitation affecting writs of error to the courts of the State; and that is a very just and necessary provision, because very important rights may depend upon a suit in a State court, where but a small amount is in controversy, and therefore any case, either civil or criminal, whatever may be the amount involved, can go up from a State court to the Supreme Court, under this twenty-fifth section. That subject was discussed, and the law stated, in the case of *Twitchell v. The Commonwealth*, 7 Wallace, 321.

There are some requirements in regard to practice which I think I may usefully mention. In the first place, a writ of error to the State court must be allowed, either by the presiding judge of the State court in which the final decision was made, or by some judge of the Supreme Court of the United States. That was decided in the case of *Gleason v. Florida*, 9 Wallace, 779, and it has always been the practice, and always understood to be the law, that a writ of error to a State court should not issue, except upon the allowance of the presiding judge of that court, or some justice of the Supreme Court of the United States. The writ is issued either by a clerk of the Circuit Court, or by the clerk of the Supreme Court of the United States. Usually, the clerk of the Circuit Court in the district where the decision of the State court was made is applied to, and issues the writ, because it is more convenient; but the clerk of the Supreme Court of the United States is equally competent to

issue it. If you will refer to the Appendix to Curtis's Digest, you will find there the particular forms, — and directions how to proceed to obtain such a writ of error, — how the writ is to be allowed, how the required bond is to be given, and all the necessary directions for obtaining such writs of error. It is unnecessary for me to repeat them, because it is better that you should look at them yourselves. I wish, however, to give one caution, and that is, you will find it stated there, that if the judgment of the State court was rendered less than thirty days before the next session of the Supreme Court to which the writ of error must be returnable, — because the writ is always returnable to the next session after the case is decided, — if rendered less than thirty days before the next session of the Supreme Court, then it may be made returnable in term, so as to get the thirty days' notice; and that was believed by me, at that time, to be law. Whether it was or not, the subject is now regulated, and it is important for you to know it. By the fourth clause of the eighth rule of the Supreme Court of the United States, they have regulated this whole matter of the returns of writs of error, and removed all doubts, if any existed before.<sup>1</sup>

The writ of error is directed to the clerk of the court where the record is, and commands him to return an authenticated copy of that record to the

<sup>1</sup> [The writ of error must be taken within two years after the judgment or decree complained of was rendered. See Rev. Stat. §§ 1003, 1008, as construed by the Supreme Court in *Cummings v. Jones*, 104 U. S. 419.]

Supreme Court of the United States. In obedience to that order, he makes out a copy of that record as it remains in his custody, certifies it, and annexes it to the writ of error, and returns it to the Supreme Court of the United States, and thus the proceeding gets before that court. If the writ of error is to act as a *supersedeas*, as it is called, — that is, to stay the execution of judgment, — then it is necessary to give a bond, and the bond must give adequate security for the performance of that judgment in case it should be affirmed by the Supreme Court of the United States. If it is reversed, of course the bond falls with the judgment; if it is affirmed, then the bond goes into operation, and is security that the judgment, whatever it is, shall be satisfied. If, however, the judgment in the State court is in favor of the defendant, then there is nothing in issue except the costs, and the bond is only given by the plaintiff for the costs. If he fails to give that bond, the defendant may take out his execution, and collect his costs. If he chooses to give it, he stays that execution until there is a final decision by the court above.

Now, there is one remaining question, which is an important one, and I will occupy the few moments which remain of the hour in stating to you what it is. This twenty-fifth section contains, at its close, this important restriction: "But no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned ques-

tions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute." That is, according to that section, the Supreme Court of the United States can inquire into no error in the record except one of these questions under this twenty-fifth section; and if they find there is no error of that kind, they affirm the judgment, and send the proceeding back to the State court, to have them execute their former judgment. But in 1867, in the Act of February 5, found in the Statutes at Large, Vol. XIV. p. 386, § 2, this twenty-fifth section was re-enacted in so many words, leaving out that clause which restricted the Supreme Court to inquiring into these particular errors; it dropped that clause entirely.<sup>1</sup> Now the question is whether that clause is repealed, and on that question there is much to be said on both sides. I do not propose to detain you upon that, but I will refer you to the case of *Stewart v. Kahn*, 11 Wallace, 502, where you will find, not a decision, but a pretty strong intimation, that the court viewed that omission as being in the nature of a repeal of that restriction. There is another

<sup>1</sup> [Soon after this lecture was delivered, — namely, December 1, 1873, — the Revised Statutes were enacted, and this Act of 1867, sect. 2, was embodied in Revised Statutes, § 709, with the same omission of the restrictive clause in the twenty-fifth section of the Act of 1789. February 15, 1875, by 18 St. 318. Ch. 80, this section, Rev. Stat. 709, was verbally amended (without changing its meaning), so that the concluding part of it now reads as follows: "The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."]

case in 12 Wallace, 694,<sup>1</sup> where the same subject is touched; but it is not a settled question whether or not that restrictive clause in the twenty-fifth section is or is not repealed. And still less is it settled what effect its repeal would have. The latter question, in my judgment, involves more difficult inquiries than the former; but this is not the place to enter into them. You perceive the great importance of these inquiries. They involve the question whether the Supreme Court of the United States, on such a record, can look into any error it could find, whether it was of local law, or whether it was one of these jurisdictional questions; and there may be cases where they would decide that, although the highest court of the State had not committed any error in deciding a jurisdictional question, they had committed an error in deciding a question of local law, and therefore would reverse the judgment. Now, whether Congress has the power to grant this authority to the Supreme Court to review, on a writ of error, any question of local law, — any question outside of those named in the twenty-fifth section, — is a grave question, on which I express no opinion.

I believe, gentlemen, this finishes all I have to say on the appellate jurisdiction of the Supreme Court as respects the State courts.

[Shortly after this lecture was delivered, — namely, in April, 1873, — the subject came before the Supreme Court in the case of *Murdock v. The City of Memphis*.<sup>2</sup> The case was argued,

<sup>1</sup> *Trebilcock v. Wilson*.

<sup>2</sup> [20 Wall. 590.]

and, at the request of the court, reargued by distinguished counsel, and Judge Curtis, as *amicus curiæ*, submitted a brief, which will be found at the end of this chapter. From this brief it will be seen that Judge Curtis had solved the doubt which he expressed in the preceding lecture, for he argues that the Act of 1867 did repeal the twenty-fifth section of the Act of 1789, and that the effect of this repeal was to give the Supreme Court authority to pass upon every question raised in a case of which they obtained jurisdiction by reason of its involving what Judge Curtis called a jurisdictional question; and finally he concluded that Congress had power under the Constitution to confer this additional jurisdiction upon the Supreme Court.

The court deliberated long, for the opinion was not rendered till January, 1875, and then it was not unanimous. The Chief Justice did not sit in the case, and three justices dissented. The majority of the court took a view different from that advocated by Judge Curtis, although they agreed with him upon the first point arising in the case. They held that the Act of 1867, sect. 2 (Rev. Stat. 709), did indeed operate as a repeal of the twenty-fifth section of the Act of 1789, but they also held, with some hesitation, that it did not confer upon the Supreme Court any new or additional authority to pass upon questions of local or common law arising in a case which came before the Supreme Court as one involving a Federal question. "Jurisdictional question," was the term employed by Judge Curtis, but "Federal question" is the

term now in use, and it was originated, I believe, in *Murdock v. Memphis*.

In short, the court held that the new act, the Act of 1867, enlarged the powers of the court in respect to cases brought before it by writ of error to the State courts, in two respects only. First, it gave the court authority to look at the opinion delivered by the State court, as well as at the technical record. This, practically, was the sole effect of omitting from the new act that clause of the old act which read as follows: "But no other error shall be assigned or regarded as a ground of reversal . . . than such as appears upon the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute."

The Supreme Court had always looked at the opinion in cases brought from the State court of Louisiana, because under the peculiar practice of that State, the opinion is a part of the technical record; but as to opinions of the court in cases arising in other States, the Supreme Court had always refused to examine them, inasmuch as they were not a part of that technical record to which the court was confined by the twenty-fifth section.

Secondly, the Act of 1867 provided that "the Supreme Court may, at their discretion, proceed to a final decision [when the judgment or decree of the State court is reversed], and award execution, or remand the case to the inferior court;" whereas, in the old act, this power of proceeding to a final

decision was given to the Supreme Court only "if the cause shall have once been remanded before." These two, the court held, were the only changes introduced by the Act of 1867, sect. 2, which is now Revised Statutes, sect. 709; and they concluded by stating the following propositions:—

1. That it is essential to the jurisdiction of this court over the judgment or decree of a State court, that it shall appear that one of the questions mentioned in the statute must have been raised and presented to the State court; that it must have been decided by the State court against the right claimed or asserted by the plaintiff in error under the Constitution, treaties, laws, or authority of the United States, or that such a decision was necessary to the judgment or decree rendered in the case.

2. These things appearing, this court has jurisdiction, and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State court.

3. If it finds that it was rightly decided, the judgment must be affirmed.

4. If it was erroneously decided against the plaintiff in error, then this court must further inquire whether there is any other matter or issue adjudged by the State court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the Federal question. If this be found to be the case, the judgment must be affirmed, without examination into the soundness of the decision of such other matter or issue.

5. But if it be found that the issue raised by the question of Federal law must control the whole



case, or that there has been no decision by the State court of any other matter which is sufficient of itself to maintain the judgment, then this court will reverse that judgment, and will either render such judgment here as the State court should have rendered, or will remand the case to that court for further proceedings, as the circumstances of the case may require.

It will be noticed that, according to the above statement, the Supreme Court is bound to pass upon a Federal question properly raised, no matter what ultimate decision it may make of the whole case. But, supposing that the case contains some non-Federal question sufficient to maintain the judgment without regard to the Federal question; in that event, since the Supreme Court are bound to affirm the decision of the State court, why should they consider the Federal question at all? This point was taken, and a motion to dismiss the writ of error was made in *Railroad Company v. Maryland*,<sup>1</sup> decided at the same time as *Murdock v. Memphis*. But the court said that, however it might have been under the Act of 1789, the omission of the restrictive words of that act from the Act of 1867, had made it the duty of the court to pass upon the Federal question in all cases. They said: "The counsel of both parties in this court are entitled to be heard when the record shows the existence of a decision which gives us jurisdiction, on the soundness of that decision, on its sufficiency to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm

<sup>1</sup> [20 Wall. 643.]

the judgment even if the Federal question was erroneously decided."

But this principle, though never expressly overruled, was very soon departed from, and has not since been observed. Thus in *Hale v. Akers*,<sup>1</sup> the court say: "In *Jenkins v. Loewenthal*,<sup>2</sup> where two defences were made in the State court, either of which, if sustained, barred the action, and one involved a Federal question, and the other did not, and the State court in its decree sustained them both, this court said that . . . even though the Federal question was wrongly decided, it would affirm the decree, without considering the Federal question or expressing any opinion upon it, and that such practice was sustained by the case of *Murdock v. City of Memphis*." A long list of authorities follows. See also *Hammond v. Johnston*.<sup>3</sup>

The law then, as now, interpreted by the Supreme Court, is, that if the case brought by writ of error from the State court contains a non-Federal question sufficiently broad to maintain the judgment, however the Federal question might be decided, the Supreme Court will affirm the decision of the State court, without considering the Federal question, and without considering whether the decision of the non-Federal question was right or wrong. But if it be found that the Federal question must control the whole case, or that there has been no decision by the State court of any other matter which is sufficient of itself to maintain the judgment, then, if the Federal question was decided rightly, the Supreme Court will affirm the judgment; if it was

<sup>1</sup> [132 U. S. 554, 565.]    <sup>2</sup> [110 U. S. 222.]    <sup>3</sup> [142 U. S. 73.]

decided wrongly, the Supreme Court will either render such judgment as the State court should have rendered, or else remand the case to that court for further proceedings, as the Supreme Court shall direct.

For example, there was a suit in Nebraska to compel specific performance of a contract to convey farm land acquired under the United States Homestead Law. The defence contended that the contract was void under that law. But the State court, without in terms passing upon this question, held that the contract was good by virtue of a certain statute of Nebraska. The United States Supreme Court, however, held that the Federal question was conclusive of the case, because if the contract violated an United States law, it could not be made valid by a State law. They held, further, that the contract was in violation of the United States law, and therefore void, and they remanded the case to the State court for further proceedings in accordance with the opinion of which this is a summary.<sup>1</sup>

This case illustrates that class of cases where the Federal question is controlling. The following case illustrates that class, mentioned first above, where a non-Federal question is controlling. A State sued a bridge company to collect a tax levied under a law of the State. The bridge company raised a Federal question by asserting that the tax was void under the United States Constitution, because it impaired the obligation of a previous contract between the bridge company and the State. But

<sup>1</sup> [*Anderson v. Carkins*, 135 U. S. 483.]

the State court found that the bridge company had voluntarily agreed, at the time of its incorporation, that the bridge should be liable to a tax; and this point being broad enough to maintain the decision, however the Federal question might be decided, the writ of error was dismissed.<sup>1</sup>

Finally, a case may arise where a Federal and a non-Federal question are involved, and where the Federal question is not conclusive of the case, or was decided wrongly by the State court, and where the non-Federal question is sufficient to maintain the judgment, but it does not appear whether the State court decided it or not. In such an event, the Supreme Court will look to see how the non-Federal question ought to have been decided; and if they find that a right decision of it would support the judgment actually made by the State court, they will infer that the State court so decided, and they will affirm the judgment. But if they find that the State court would have been obliged to decide the non-Federal question wrongly in order to reach the judgment which they made, they will not infer that the State court so decided. On the contrary, they will infer that the State court did not touch the non-Federal question; and therefore the Supreme Court will either decide the case itself on the Federal question involved (if that be broad enough) or remand the case to the State court.

Whereas, if it plainly appeared from the record that the State court had so decided, — that is, had

<sup>1</sup> [*Henderson Bridge Co. v. Henderson City*, 141 U. S. 679. See also *De Saussure v. Gaillard*, 127 U. S. 216, 233.]

decided the non-Federal question, and decided it wrongly, — the Supreme Court would affirm the judgment, provided, of course, that the non-Federal question was sufficient to maintain the judgment. This point, and it is a rather subtle one, is stated in substance on pp. 38, 39, *supra*, and it is illustrated by the cases of *Neilson v. Lagow*, and *Klinger v. State of Missouri*, there cited.

It is very important that the record should clearly show that the Federal question was duly set up in the State court, and passed upon by that court, for otherwise the Supreme Court are at liberty to hold that there is no such question in the case, and to dismiss the writ of error. The proper time and the proper way of setting up the Federal question are stated by Judge Curtis (*supra*, pp. 34, 35). It has been held that it is too late to set up a Federal question upon a petition to the State court for a rehearing.<sup>1</sup>

It is held also that the petition for the writ of error forms no part of the record, so far as the Supreme Court is concerned, and hence that the Federal question cannot first be set up in that petition. The opinion, as we have seen, is now a part of the record, but it does not carry so much weight as the technical record; and if the case really contains no Federal question, a statement in the opinion that it does so will not suffice. This remark is equally true of the whole record. The Supreme Court say: "It is not enough to give us jurisdiction over the judgments of the State courts for a record to show that a Federal question was

<sup>1</sup> [*Miller v. Texas*, 153 U. S. 535.]

argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it actually was decided, or that the judgment as rendered could not have been given without deciding it.”<sup>1</sup>

When there is no opinion, or when the opinion does not mention the Federal question involved, this deficiency should be supplied by a certificate of the presiding justice of the State court, setting forth the Federal question involved.<sup>2</sup> But this certificate is not conclusive of the fact which it states. “While always regarded with respect,” the Supreme Court declare, “it cannot confer jurisdiction upon this court to re-examine the judgment below.”

In a recent important case<sup>3</sup> it did not appear from the opinion of the court below that a Federal question was raised or passed upon. The certificate of the presiding judge, however, stated such a question, and stated that it was decided adversely to the plaintiff in error. The Supreme Court therefore looked into the record, and, finding that “the necessary effect of the decree” was to determine a Federal question, and to determine it adversely to the plaintiff in error, they held that the jurisdiction attached. They quoted with approval what had been said in a former case as to the office of the certificate; namely, that it is “to make more certain and specific what is too general and indefi-

<sup>1</sup> [*Citizens' Bank v. Board of Liquidation*, 98 U. S. 146. See also *Murdock v. City of Memphis*, 20 Wall. 590, 633.]

<sup>2</sup> [*Johnson v. Risk*, 137 U. S. 300.]

<sup>3</sup> [*Roby v. Colehour*, 146 U. S. 153.]

nite in the record." The question in this case was described by the court as a "close one," and the opinion is very instructive upon the subject.

The Federal question should also be stated in the assignment of errors, which is required by Revised Statutes, sect. 997, in the following language:—

"There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation<sup>1</sup> to the adverse party." No. 21 of the United States Supreme Court Rules declares that "when there is no assignment of errors . . . counsel will not be heard except at the request of the court." It adds, however, that "the court at its option may notice a plain error not assigned or specified." The Supreme Court Rules require also that the Federal question or questions relied upon shall be stated in the brief of counsel for the plaintiff in error.

The strictness of the rule requiring the Federal question relied upon in the United States Supreme Court to have been raised before the State court is shown by the case of *Morrison v. Watson*.<sup>2</sup> This was an action of ejectment in a North Carolina court to recover 100 acres of land. The plaintiff,

<sup>1</sup> [The citation must be "signed by the Chief Justice or Judge or Chancellor of the Court rendering or passing the judgment or decree complained of, or by a Justice of the Supreme Court of the United States in the same manner . . . as in a court of the United States." Rev. Stat. § 709. As to who should be parties to an appeal or writ of error, see *infra*, p. 98.]

<sup>2</sup> [154 U. S. 111.]

to prove that he owned the land, produced a deed to him at sheriff's sale on execution. A statute of the State exempted from such levy and execution all homesteads of a value less than \$1000; and the only defence in the State court was that this land was not worth \$1000. But the act of exemption just stated was passed after the contracting of the debt for which the land was sold; and in the United States Supreme Court it was argued that the State statute was void, so far as it applied to this debt, because it impaired the obligation of a contract. This was a valid defence and a good Federal question, but the Supreme Court held that the defendant had taken the point too late. They said: "If it was not claimed in any form before judgment in the highest court of the State, it cannot be asserted in this court."

This rule, however, must be taken as limited to those cases where a Federal question might or might not have been present in the minds of the court. Sometimes the decision itself is of such a nature as to show that a Federal question must have been passed upon by the State court in coming to its conclusion; and in such cases the Supreme Court are at liberty to consider it, if they see fit, although the record (including, of course, the opinion) is silent upon the subject. But they are not bound to consider it. Rule 21 (of the Supreme Court Rules), already cited, is declaratory of the law in this respect, for it provides that "when there is no assignment of errors . . . counsel will not be heard, *except at the request of the court,*" and "the court, at its option, may notice a plain



error *not assigned or specified*." And the Supreme Court have said:—

"It is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the State court."<sup>1</sup>

And this is so even although the State court, in its opinion, puts the decision entirely upon non-Federal grounds. "A judgment which rejects the claim [as to a Federal question], but avoids all reference to it, is as much against the right, within the meaning of section 709 of the Revised Statutes, as if it had been specifically referred to, and the right directly refused."<sup>2</sup> On the other hand, the formal averment in the record of a specific Federal question is not sufficient to raise such a question when none really exists. "It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay."<sup>3</sup>

Here follows the brief submitted by Judge Curtis in *Murdock v. The City of Memphis*, *supra*.]

<sup>1</sup> [*Kaukauna Water Power Co. v. Green Bay, &c., Canal Co.*, 142 U. S. 254, 269. See also *Arrowsmith v. Harmoning*, 118 U. S. 194.]

<sup>2</sup> [*Chapman v. Goodnow*, 123 U. S. 540, 548. See *O'Neil v. Vermont*, 144 U. S. 323, and especially the dissenting opinions which seem to be more logical than the opinion of the majority.]

<sup>3</sup> [*New Orleans v. New Orleans Water Works*, 142 U. S. 79, 87. See also *Hamblin v. Western Land Co.*, 147 U. S. 531.]

*Some Observations concerning the Repeal of the Twenty-Fifth Section of the Judiciary Act of 1789, by the Second Section of the Act of February 5th, 1867 (14 Statutes at Large, 385). By Mr. B. R. CURTIS, as Amicus Curie.*

Three questions may be considered :—

- 1st. Does the later statute repeal the earlier ?
- 2d. If so, what changes in the previously existing law have been made by such repeal ?
- 3d. Had Congress power to make these changes ?

#### AS TO THE FIRST QUESTION.

The general subject of each law is the same. Each confers appellate jurisdiction on the Supreme Court of the United States, over judgments of State courts, which, *by reason of their subject-matter*, are within the judicial power of the United States, under the first clause of the second section of the third article of the Constitution ; and each defines the cases in which that appellate power may be exercised, and regulates the mode of exercising that appellate power under the second clause of the same section.

The two laws differ in the following particulars :—

- 1st. In defining the cases over which this appellate power shall extend.

In the earlier law one class of cases was described as follows : “ Or where is drawn in question *the construction* of any clause of the Constitution, or of a treaty or statute of, or commission held under the United States.”

In the later law there is substituted the following description : “ Or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States,” etc.

The earlier law describes and includes only cases where *some question of construction* is drawn in question. The later law applies to and includes all cases where a *title*, etc. was claimed under the Constitution, etc., and the decision was against the validity of *that title*, whether that decision rested upon some question of *construction* of the Constitution, or some law or treaty of the United States, or upon any other question entering into the decision of the State court on the title capable of being assigned as erroneously made in contravention of law.

This latter description may include cases other than those embraced in the earlier law. The State court may have decided against the *title*, etc., without misconstruing the Constitution or any Act of

Congress, and yet have made a decision erroneous in point of law in the judgment of the appellate tribunal.

It seems to have been intended to place titles, rights, privileges, or immunities claimed under the Constitution, laws, or treaties, of the United States under the final guardianship of this court, on whatever questions of law the same might depend.

Suppose the State court ruled erroneously in admitting or rejecting evidence, or any other question of local law, and the decision was against the right or title, not by reason of any misconstruction of the Constitution, but by reason of such erroneous ruling. It seems to have been the intention of Congress to enable this court to protect the right, etc., claimed under the United States from the effect of such errors.

2d. The laws differ in the regulations each prescribes for the regulation of the exercise of this appellate power.

The former law restricts the assignment of errors to those appearing *on the face of the record*, and it had been construed strictly to refer to the technical record.

The later law omits this provision.

The former law further restricts the appellate power of this court to errors "which immediately respect the before-mentioned questions of construction," etc.

The later law contains no such restriction, and any error in law made duly apparent to the court of errors is left assignable.

The action of the appellate court on reversal is not required by each law to be the same. The earlier law confers discretion to proceed to a final judgment, and award execution,—"if the cause shall have been once remanded before." The later law confers this discretion without qualification.

This is a case where the later statute was manifestly intended to cover and provide for the subject-matter of the earlier law, and to qualify the provisions of the earlier law, not only by omission, but by addition and alteration; and all authorities, I believe, agree that in such a case the later repeals the earlier act by necessary implication. *Stewart v. Kahn*, 11 Wallace, 502; *United States v. Tynen*, 11 Wallace, 92; *Ellis v. Page*, 1 Pick. 45; *Nichols v. Squire*, 5 Pick. 168.

II. The changes made by this repeal have already been pointed out, and it is unnecessary to repeat them.

III. Had Congress power to make these changes?

The judicial power of the United States extends to *all cases* arising under the Constitution, laws, and treaties of the United States,

and the appellate jurisdiction over all these cases is to be exercised with such exceptions and under such regulations as Congress may make.

It is to be observed that the judicial power extends to cases,—not merely to particular questions arising in cases.

And no distinction is made by the Constitution between the extent of the judicial power which may be exercised by courts of the United States having original jurisdiction conferred by Congress, by reason of the subject-matter of the case, and the extent of that power which may be conferred by Congress, to be exercised by an appellate court. If the case is within the judicial power of the United States, the power of Congress is as plenary to confer appellate power over the whole case as to confer original jurisdiction over it. And from the origin of the government, appellate power has been conferred by Congress over entire cases (including all questions arising in them), which come within the judicial power of the United States, by reason of their subject-matter. This was true under the twelfth section of the Judiciary Act of 1789, in reference to lands claimed under different States.

In *Martin v. Hunter*, 1 Wheaton, 349, Mr. Justice Story, speaking for the court, said:—

“This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language, a grant of original jurisdiction; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law, in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed, in both cases, an exercise of appellate, and not of original, jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power; and, as Congress is not limited by the Constitution to any particular mode or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it

from being applied by the legislature to interlocutory as well as final judgment. And if the right of removal from State courts exists before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power by the Constitution does not include cases pending in the State courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together; nor indeed would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of State tribunals."

In *Mayor v. Cooper*, 6 Wallace, 247, it was held that this power of removal on account of the subject-matter was plenary, and rested on the same ground as the twenty-fifth section of the Act of 1789.

In *Osborne v. Bank of United States*, 9 Wheaton, 823, the meaning and extent of the Constitution, and its inclusion of the entire case, if Congress saw fit to confer jurisdiction over it as a case, were demonstrated by Chief Justice Marshall, and his exposition of the plenary power of Congress over both original and appellate jurisdiction in such cases has been deemed settled. (See *Fisk v. Union Pacific Railroad*, 6 Blatch. 362; s. c., 8 Blatch, 243.) Unless, therefore, some distinction can be made between the power of Congress to confer original and appellate jurisdiction, and neither the Constitution nor the decisions of this court permit this distinction, it is clear that Congress may confer appellate power over all cases to which the judicial power of the United States extends, and is not restricted by the Constitution to particular questions, by reason of which the cases are brought within the judicial power of the United States. Nor is it essential to the grant of appellate power over the State courts in the cases enumerated in the Constitution, that the State courts should have actually decided some question under the Constitution, laws, or treaties of the United States, against a right, title, or immunity claimed under them, or one of them. If this were essential, there could be no removal, as provided by the twelfth section of the Judiciary Act of 1789, or any of the subsequent statutes which have conferred the right to remove suits from State courts before trial on account of their subject-matter; all of which proceed on the assumption, that, though the right of removal depends on the subject-matter, the State court has not made any decision thereon.

But it may be argued, that if this court, on a writ of error, finds the State court has rightly construed the Constitution, and each law

or treaty under which the right, title, privilege, or immunity is claimed, and has only decided erroneously on some other question of law on which that right, title, etc., depended, there can be no exercise of the appellate judicial power of the United States.

But this would make the jurisdiction to try and decide the case dependent, not on its subject-matter, but on the decision of the appellate court in the exercise of its jurisdiction concerning that subject-matter. This is wholly inadmissible. When the case comes into this court, it is within the judicial power of the United States by reason of its subject-matter; and its subject-matter is not changed by any decision the court can make thereon.

It is submitted that, by the Act of 1867, Congress intended to confer on this court appellate power over the "case," and that it had constitutional authority so to do.

Respectfully submitted by

B. R. CURTIS, *Amicus Curia*.

### CHAPTER III.

#### APPEALS FROM FEDERAL COURTS.

[THE Constitution, after declaring what shall be the original jurisdiction of the Supreme Court, goes on to provide that "In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and such regulations as the Congress shall make." Congress, therefore, and Congress only, has power to regulate the appellate jurisdiction of the Supreme Court over the inferior Federal Courts.

The earliest statute upon this subject was the Judiciary Act of 1789. This act divided the United States into Circuits, each Circuit being composed of two or more States, and, further, into Districts, each State forming a District, except that a few of the larger States were divided into two or more Districts. In every Circuit there was established a Circuit Court, and in every District a District Court; and these are the inferior Federal Courts which Congress, pursuant to the power lodged in it by the Constitution, created by the Act of 1789. These courts are still in existence, and in fact, down to the year 1891, the Act of 1789, with some slight changes, remained in force. Under that act, an appeal lay from the District Court to the Circuit Court, and

from the Circuit Court to the Supreme Court. In a few cases, such, especially, as patent and revenue suits, there was no money limit to this appellate jurisdiction; but in most cases an appeal to the Supreme Court could not be had unless the amount involved exceeded \$2000; and in 1875 this sum was raised to \$5000.

Under this system, it was easy to provide for the increasing business of the inferior Federal Courts by creating new Circuits and new Districts; but there was no way of providing for the excess of cases with which the Supreme Court gradually became encumbered. By 1890, the business of that court was so much in arrears that, on the average, four years elapsed between the time when a case was appealed from the Circuit Court and the time when it was heard in the Supreme Court. To obviate this scandalous delay, and to relieve the Supreme Court, Congress, by the Act of March 3, 1891,<sup>1</sup> created nine Circuit Courts of Appeal, — one for each Circuit.

The Circuit and District Courts are described elsewhere in this book, but a few words about them here will be necessary to afford an understanding of the Circuit Courts of Appeal. There is one District Judge in every District, appointed, it need not be said, by the President. Originally, the Judges of the Circuit Court were the Justices of the Supreme Court, each of whom (and this practice still holds) was assigned to a particular Circuit, and he held court in that Circuit when the Supreme Court was not in session, — hence the title, "Circuit" Judge.

<sup>1</sup> [26 Stat. at Large, 826, chap. 517.]



By the year 1869, the business of the Circuit Courts had increased so much that Congress authorized the President to appoint one Circuit Judge for each Circuit, to hear cases in the absence of the Supreme Court Justice, and to sit with him when he desired such assistance. Subsequent acts increased the number of Circuit Judges to two in several Circuits where the business of the Court was excessive. It was lawful also (and this is still the case) for any District Judge to hold the Circuit Court in his Circuit, at the request of the Circuit Judge; so that the Circuit Court might be composed at any time of a Supreme Court Justice, or of the Circuit Judge, or of a District Judge, or of any two of these.

The act creating the new Circuit Courts of Appeal provided for the appointment of a second Circuit Judge in each Circuit; and it declared that the court (one in each Circuit, be it remembered) should be composed of three Judges, any two of whom should make a quorum. These Judges, any two or three of whom may constitute the Circuit Court of Appeals, are the following: the Supreme Court Justice assigned to that Circuit; the Circuit Judges; the District Judges in that Circuit, who may sit in the absence of the Circuit Judges. The act further provides that no Justice or Judge shall sit in the Circuit Court of Appeals in any case which was tried before him as Judge of the Circuit or District Court;<sup>1</sup> and this provision, it will readily be seen, makes necessary, as a rule, the presence of one or more District Judges on the bench of the Circuit

<sup>1</sup> [See *American Construction Co. v. Jacksonville, Tampa, and Key West Ry. Co.*, 148 U. S. 372.]

Court of Appeals, in cases appealed from the Circuit Court. Perhaps the most usual composition of the Appellate Court is one Circuit Judge and two District Judges. It is quite conceivable that the court should be composed of three District Judges. The Supreme Court Justices are usually engaged in Washington.

Such is the new court created by the Act of 1891. The statute begins by taking away entirely the right of appeal from the District to the Circuit Court. The Circuit as well as the District Court is now purely a court of original jurisdiction. The act then divides all cases in those courts into two classes: the one, the smaller and more important class, is made appealable directly to the Supreme Court; the other class is made appealable to the Circuit Court of Appeals, and the decision of that court is final, except in a few cases, and except also, that any new or difficult question of law arising in the Circuit Court of Appeals may be certified to the Supreme Court. This last provision enables the Supreme Court to harmonize those differences of opinion which inevitably occur between the various Circuit Courts of Appeal. I now take up the statute in detail.

“Appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases: <sup>1</sup>

“(a) In any case in which the jurisdiction of the Court <sup>2</sup> is in issue; in such cases the question of

<sup>1</sup> [The writ of error is a matter of right. *In re Claasen*, 140 U. S. 200. But it can be taken only after final judgment. *McLish v. Roff*, 141 U. S. 661, 668.]

<sup>2</sup> [See *In re Lennon*, 150 U. S. 393.]

jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

“(b) From the final sentences and decrees in prize causes.

“(c) In cases of conviction of a capital or otherwise infamous crime.<sup>1</sup>

“(d) In any case that involves the construction or application of the Constitution of the United States.

“(e) In any case in which the constitutionality [not the construction] of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

“(f) In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.”

It is to be noticed in the first place that the act provides for appeals, as well as for writs of error; whereas, as we have seen, the appellate jurisdiction of the Supreme Court over the State courts is exercised only by writs of error. The difference is an important one, for writs of error take up merely questions of law; whereas an appeal carries up the whole case, evidence and all. In all equity and admiralty cases, therefore,—for these are the cases

<sup>1</sup> [Upon this section Judge Sawyer has remarked, not without humor, as follows:—“Prior to the Act of 1879, there was no appeal in criminal cases, except on certificate of opposition of opinion, yet the country got along very well for a century under that system. Under the newly adopted system, since it costs the convicted party nothing to litigate, the government paying all the expenses on both sides, and often appointing counsel for the impecunious, no convict is likely to be hanged, or find his way into the penitentiary, till he gets to the end of the law at Washington.” *United States v. Sutton*, 47 Fed. Rep. 129.]

which go up by appeal, — the Supreme Court, if it has jurisdiction under any one of the foregoing clauses, reviews decisions of the inferior Federal Courts upon matters of fact as well as of law.<sup>1</sup>

It is to be observed also that the limitation mentioned in clause (a) does not apply to the other clauses. Consequently, in all cases except those of jurisdiction, the Supreme Court may review not only the Federal question involved, but also any other question in the cause which can be brought before it by writ of error or appeal, as the case may be.<sup>2</sup>

The questions of jurisdiction intended by this clause (a) are of course questions arising under the statute: a question as to whether the court below had legal or equitable jurisdiction of a particular matter does not come within this clause.<sup>3</sup> A certificate, from the court below, as to the question of jurisdiction involved, has been held by the Supreme Court to be indispensable. They said: "A certificate . . . is explicitly and in terms required. . . . The narrowness of range in the particular instance can make no difference in the application of the principle."<sup>4</sup> This rule, however, has been modified by subsequent decisions; and "it is sufficient if there is a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction, and the precise

<sup>1</sup> [See *Dower v. Richards*, 151 U. S. 658.]

<sup>2</sup> [See *Chappell v. United States*, 160 U. S. 499.]

<sup>3</sup> [See *Smith v. McKay*, 16 Supr. Ct. Rep. 490.]

<sup>4</sup> [See *Maynard v. Hecht*, 151 U. S. 324. And the certificate must be granted at the same term during which the judgment or decree complained of was made: *Colvin v. Jacksonville*, 158 U. S. 456.]

question clearly, fully, and separately stated. No mere suggestion that the jurisdiction of the court was in issue will answer. This court will not of itself search, nor follow counsel in their search of the record, to ascertain whether the judgment of the trial court did or did not turn on some question of jurisdiction.”<sup>1</sup>

Suppose, however, that you desire to appeal from the Circuit or the District Court, as the case may be, both on the question of jurisdiction, and also on the merits of the case; and suppose further that the case is one which, on its merits, is made appealable, not to the Supreme Court, but to the Circuit Court of Appeals. In such a contingency can you first take your writ of error to the Supreme Court, on the question of jurisdiction, and then, if that be decided against you, have the case tried on its merits afterward in the lower court; or, supposing that the case has been decided against you in the lower court, can you then take your writ of error to the Supreme Court on the question of jurisdiction, and your writ of error (or appeal) to the Circuit Court of Appeals on the merits of the case, so as to have an appeal pending at the same time in each court? The Supreme Court have answered both of these questions in the negative. They say: “The writ of error or the appeal may be taken only after final judgment. When that judgment is rendered, the party against whom it is rendered must elect

<sup>1</sup> [See *Chappell v. United States*, 160 U. S. 499, where the cases are reviewed. The most recent case is *Davis v. Geissler*, 162 U. S. 290.]

whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case.”<sup>1</sup> And in the latter event, the question of jurisdiction may be raised and decided in the Circuit Court of Appeals, along with the other questions involved, although the defendant might have carried it directly to the Supreme Court.<sup>2</sup>

In a recent case,<sup>3</sup> the Supreme Court sum up the law upon this subject as follows: “(1) If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified . . . directly to this court. (2) If the jurisdiction is sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff . . . must appeal to the Circuit Court of Appeals, where, if the question of jurisdiction arises, that court may, in their discretion, certify it to the Supreme Court. (3) If the jurisdiction is sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question of jurisdiction certified directly to this court, or to carry the whole case to the Circuit Court of Appeals, where the question of jurisdiction can be decided, or whence it can be certified to the Supreme Court. (4) If in the last-mentioned case, the plaintiff complains of the judgment rendered in his favor, he may also carry the case on the merits to the Circuit Court of

<sup>1</sup> [*McLish v. Roff*, 141 U. S. 661.]

<sup>2</sup> [*American Sugar Refining Co. v. Johnson*, 60 Fed. Rep. 503.]

<sup>3</sup> [*United States v. Jahn*, 155 U. S. 109.]

Appeals, and this he may do by way of cross appeal or writ of error, if the defendant has taken the case there; or independently, if the defendant has carried the case to the Supreme Court on the question of jurisdiction alone, and in this instance the Circuit Court of Appeals will suspend a decision upon the merits until the question of jurisdiction has been determined. (5) The same observations are applicable where a plaintiff objects to the jurisdiction, and is, or both parties are, dissatisfied with the judgment on the merits."

The clause (b) requires no comment, and as to clause (c) it need be said only that an "infamous" crime means one punishable (not necessarily punished<sup>1</sup>) by imprisonment in a State prison or penitentiary, with or without "hard labor." A crime punishable by fine only or by imprisonment in a county jail or house of correction is not an "infamous" crime.<sup>2</sup>

It must be remembered that the jurisdiction of the Supreme Court in criminal cases is exercised only by a writ of error, not by appeal, and consequently they have authority to pass only upon questions of law, not upon questions of fact raised in such cases.<sup>3</sup>

As to clause (d) one remark only need be quoted. The Supreme Court have said: "The construction or application of the Constitution of the United States must be involved as controlling, although on appeal or error all other questions would be

<sup>1</sup> [*Stokes v. United States*, 60 Fed. Rep. 597.]

<sup>2</sup> [*In re Mills*, 135 U. S. 263; *Jones v. Robbins*, 8 Gray, 329, 347.]

<sup>3</sup> [*In re Buchanan*, 158 U. S. 31.]

open to determination, if inquiry were not rendered unnecessary by the ruling on that arising under the Constitution,"<sup>1</sup> and the latter part of this remark, as we have seen, applies to all cases except those which involve a question of jurisdiction alone.<sup>2</sup>

As to clause (e) it should be noticed that the appeal lies only when the constitutionality of a law of the United States is drawn in question; it does not lie when the construction merely of such a law is involved.

Jurisdiction exists under clause (f), "If in a given suit, the ultimate question involved is whether a State statute is void, either because it impairs rights that are guaranteed by the Federal Constitution or because the legislature of a State has assumed to exercise powers that have been surrendered to the general government."<sup>3</sup> This clause, it need hardly be said, does not cover those cases where the statute of a State is alleged to violate the Constitution of that State.

One general remark should be made here. The Federal question which gives to the Supreme Court jurisdiction must appear at the outset from the pleadings. It is not sufficient that such a question arises in the course of the litigation.<sup>4</sup>

And now as to cases appealable not to the Supreme Court, but to the Circuit Courts of Appeal. Section 6 of the statute runs as follows: "The Circuit Courts of Appeal established by this Act

<sup>1</sup> [*Carey v. Houston & Texas Central Ry.*, 150 U. S. 170, 181.]

<sup>2</sup> [*Horner v. United States*, 143 U. S. 570, 577.]

<sup>3</sup> [*Hastings v. Ames*, 68 Fed. Rep. 726.]

<sup>4</sup> [*Borgmeyer v. Idler*, 159 U. S. 408.]



shall exercise appellate jurisdiction<sup>1</sup> to review by appeal or by writ of error final decision<sup>2</sup> in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act [which is the one, already stated, dealing with the Supreme Court], unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty<sup>3</sup> cases; excepting that in every such subject within its appellate jurisdiction, the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Courts of Appeals [*sic*] in such cases, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the

<sup>1</sup> [There is no money limit to the jurisdiction of the Circuit Court of Appeals. *Northern Pacific Ry. Co. v. Amato*, 49 Fed. Rep. 881.]

<sup>2</sup> [As to what is a final decision, see *Central Trust Co. of New York v. Marietta, &c. Ry. Co.*, 48 Fed. Rep. 850.]

<sup>3</sup> [In such cases, the court may review questions both of law and fact. *The Havilah*, 48 Fed. Rep. 684.]

same manner as if it had been brought there for review by writ of error or appeal.

“And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority as if it had been carried by appeal or writ of error to the Supreme Court.

“In all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.” The rest of the statute deals with appeals from injunctions and other matters of practice which I shall notice presently.

The first words to require construction are these, which occur near the beginning of the section, “unless otherwise provided by law.” This means, unless otherwise provided by the law of this very act, or of some subsequent act: the words do not refer to laws existing prior to the Act of 1891; and, further, they have this intention, as described by the Supreme Court: “The words, ‘unless otherwise provided by law,’ were manifestly inserted out of abundant caution in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it

away, except when expressly so provided. Implied repeals were intended to be thereby guarded against.”<sup>1</sup>

Those parts of the section which relate to certifying questions to the Supreme Court, and to the power of the Supreme Court to order the record in certain cases to be sent up to it for review have also been construed by the court. These two clauses relate to the same class of cases; that is, to cases made final in the Circuit Court of Appeals. It is true that the first of these two clauses, the one, that is, giving the Circuit Court of Appeals power of its own motion to certify up cases, begins as follows: “Excepting that in every such subject within its appellate jurisdiction,” which would include cases not made final in that court. But a subsequent clause provides that in all cases not made final in the Circuit Court of Appeals, there shall be of right an appeal to the Supreme Court. Consequently it must be held that the power of certifying up questions of law applies only to cases made final in the Circuit Court of Appeals.

The Supreme Court have discouraged the exercise of this power, except in cases of great importance. The Act of 1891 was passed, as we have seen, to relieve the Supreme Court; and therefore the Supreme Court construe it strictly.<sup>2</sup> An interesting case which states when it is proper for the Circuit Court of Appeals to certify questions of law to the Supreme Court, for instruction, and

<sup>1</sup> [Lau Ow Bew, 144 U. S. 47, 56.]

<sup>2</sup> [*American Construction Company v. Jacksonville, Tampa, & Key West Railway Co.*, 148 U. S. 372, 382.]

in what manner such questions should be certified, is *Columbus Watch Co. v. Robbins*.<sup>1</sup>

It will be observed that although the Circuit Court of Appeals are to certify only "questions or propositions of law" to the Supreme Court, yet that the next paragraph gives the Supreme Court authority to require that the whole record should be sent up to it for review. It makes no difference, therefore, whether the Circuit Court of Appeals or the Supreme Court takes the initiative; in either court, the Supreme Court may consider and pass upon the whole case. The two provisions give a double opportunity to the defeated party in the Circuit Court of Appeals. If he considers that his case involves questions of law of such novelty and importance that they deserve to be passed upon by the Supreme Court, he may petition the Circuit Court of Appeals to certify them accordingly; and if that court refuses so to do, he may then petition the Supreme Court to direct, by writ of *certiorari*, that the record should be sent up to them. But, in this case, still more, perhaps, than when the Circuit Court of Appeals take the initiative, the Supreme Court will act only if the circumstances are extraordinary. Thus they say that this is a branch of the court's jurisdiction which should be exercised "only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision [between the various Circuit Courts of Appeal]. Accordingly, while there have been many applications to this court for writs of *certiorari*

<sup>1</sup> [148 U. S. 266. See also *Cincinnati, Hamilton, &c. R. R. Co. v. McKeen*, 149 U. S. 259; *Graver v. Faurot*, 16 Supr. Ct. Rep. 799.]

to the Circuit Court of Appeals under this provision, two only have been granted, the one in *Lau Ow Bew's Case* (144 U. S. 47), which involved a grave question of public international law, affecting the relations between the United States and a foreign country; the other in *Fabre, Petitioner*, No. 1237 of the present term, an admiralty case, which presented an important question as to the rules of navigation; . . . and in each of those cases the Circuit Court of Appeals had declined to certify the question to this court."<sup>1</sup>

This power to bring up a case by *certiorari* may be exercised at any stage of the case in the court below; the Supreme Court need not wait until the Circuit Court of Appeals has made its final decree. But, as the Supreme Court said in the case just cited: "Doubtless this power would seldom be exercised before final judgment in the Circuit Court of Appeals, and very rarely indeed before the case was ready for decision upon the merits in that court. But the question at what stage of the proceedings and under what circumstances the case should be required by *certiorari* or otherwise to be sent up for review is left to the discretion of this court, as the exigencies of each case may require."

The next clause in the section has also been construed by the courts, and it has given rise to some very close analysis. I repeat it here: "In all cases not hereinbefore in this section made final there shall be of right an appeal or writ of error or

<sup>1</sup> [See also *American Construction Co. v. Jacksonville, Tampa, & Key West Railway Co.*, 148 U. S. 372; *Dashiell v. Grosvenor*, 75 Off. Gaz. 507.]

review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed one thousand dollars besides costs." And the appeal, etc., must be taken within one year. This section has been construed chiefly in reference to cases appealed from the highest courts of the territories, and consequently it is necessary first to state what laws govern such appeals. By Rev. Stat. 702, and by the Act of March 3, 1885, 23 Stat. 443, c. 355, final judgments and decrees of the Supreme Courts of the territories, where the matter in dispute, exclusive of costs, exceeds the sum of \$5000, may be reviewed in the Supreme Court, as if they were final judgments or decrees of a Circuit Court. The court have held that this provision is still in force.<sup>1</sup> The present act, the Act of 1891, now under consideration, provides in addition that the Circuit Courts of Appeal "in cases in which judgments of the Circuit Courts of Appeal are made final by this act," shall have the same appellate jurisdiction over the Supreme Courts of the territories that they have over the Circuit and District Courts.<sup>2</sup> In *Aztec Mining Co. v. Ripley*,<sup>3</sup> a suit upon a contract involving \$1657 had been decided by the Supreme Court of New Mexico. The defeated party sued out a writ of error to the Circuit Court of Appeals for the 8th Circuit, which was dismissed for want of jurisdiction, and then a writ of error was taken from the United States Supreme Court. The Supreme Court held that

<sup>1</sup> [*Shute v. Keyser*, 149 U. S. 649.]

<sup>2</sup> [As to the Indian Territory, see 28 Stat. 695.]

<sup>3</sup> [151 U. S. 79.]

since this case did not come within any one of the cases enumerated by the Act of 1891 as "made final" in the Circuit Court of Appeals, that court had no jurisdiction over it; the cases appealable to that court from the Territorial Courts, under the Act of 1891, being, as I have just stated, limited to such cases as are "made final" in that court by the act.

The Supreme Court, however, held that inasmuch as the act gave the Supreme Court authority to require cases "made final" to be certified to it for review, and, in cases not made final, gave the defeated party an absolute right of appeal, it must have been intended by the statute that "jurisdiction might be entertained by this court to pass upon the jurisdiction of that court [the Circuit Court of Appeals] when involving the question of the finality of its judgment under section six." At least, such I understand to be the reasoning of the court, though I confess that I do not quite follow it. At all events, the court plainly decided that it had jurisdiction to pass upon the question whether the Circuit Court of Appeals had jurisdiction over the case; and I presume that it would have the same power in respect to any question of jurisdiction of the lower court which could arise under the statute.

In another case, an action of contract involving less than \$1000, a writ of error was taken from the Supreme Court of New Mexico to the Circuit Court of Appeals for the 8th Circuit. It was admitted that the case did not come within the list of cases "made final" in the Circuit Court of Appeals, and therefore that it was not within the

clause (the 15th) which gives that court the same jurisdiction of Territorial cases that it has over Circuit and District Court cases. But it was contended that the Circuit Court of Appeals had jurisdiction of this case by implication, under the clause which we are now considering; namely, "In all cases not hereinbefore in this section made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed \$1000 besides costs." The argument (and the court considered it "plausible") was as follows: This clause disposes of *all* cases not already "made final." As to those of them which involve more than \$1000, it says that there shall be an appeal to the Supreme Court; as to those involving less than \$1000, it provides for no appeal, and therefore it must be inferred that these cases also are appealable to and final in the Circuit Court of Appeals, since this clause of the statute is dealing with all cases "not hereinbefore in this section made final." The present case is such a case, and therefore it may be carried to the Circuit Court of Appeals, and is final there.

But the court held that the purpose of this clause was to deal only with cases of which the statute had already given the Circuit Court of Appeals jurisdiction; and that it could not be construed as conferring any new jurisdiction upon it. "This proviso," they said, "limits the jurisdiction of the Supreme Court, but it does not enlarge that of the Circuit Court of Appeals."<sup>1</sup> The court also pointed

<sup>1</sup> [*Badaracco v. Cerf*, 53 Fed. Rep. 169.]



out that to hold otherwise would be to bring about this absurdity ; namely, that Territorial cases involving less than \$1000 could be taken by writ of error to the Circuit Court of Appeals, whereas Territorial cases involving more than \$1000 could not be taken there.<sup>1</sup>

It was held in an interesting case <sup>2</sup> that a suit by the United States to cancel a patent falls within this clause, — such a suit being regarded not as one “arising under the patent laws,” but as one in which “the United States are plaintiffs or petitioners.” It is therefore appealable, under the general clause, to the Circuit Court of Appeals, and, since it is not “made final” there, it is appealable thence to the Supreme Court, under the clause now in question.

The next section of the statute, as amended by Act of February 18, 1895, 28 Stat. 666, ch. 96, is as follows: —

Sec. 7. Where upon a hearing in equity in a District Court or a Circuit Court, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an

<sup>1</sup> [One anomaly in regard to the Territorial Courts arises under this Act of 1891. In capital cases and in cases of infamous crimes there is no appeal from the Territorial Courts, but in cases of minor crimes there is an appeal to the Circuit Court of Appeals. See *Folsom v. United States*, 160 U. S. 121.]

<sup>2</sup> [*United States v. American Bell Telephone Co.*, 159 U. S. 548.]

injunction, to the Circuit Court of Appeals: *Provided*, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the Appellate Court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal: *And provided further*, that the court below may in its discretion require as a condition of the appeal, an additional injunction bond.”<sup>1</sup>

The sentence “and the proceedings in other respects in the court below shall not be stayed,” etc., might be taken to imply that as to the injunction itself the proceedings should be stayed; that is, that pending a hearing, the injunction should be held in abeyance, and that a *supersedeas*, having this effect, should issue as a matter of course. But the Supreme Court have decided otherwise. They hold that the injunction, though appealed from, may continue in force till the Circuit Court of Appeals disposes of the appeal; and that a writ of mandamus from the Supreme Court to compel the issue of a *supersedeas* by the court below will not lie. That court, the Supreme Court hold, has an absolute discretion in the matter.<sup>2</sup>

Two other questions, one of them a question of much difficulty, have arisen under this clause. First, what is meant by “interlocutory” decree?

<sup>1</sup> [The statute, as originally passed, did not include orders or decrees “refusing” or “dissolving” an injunction.]

<sup>2</sup> [*In re Haberman Mfg. Co., Petitioner*, 147 U. S. 525, overruling *Société Anonyme du Filtre Chamberland Système Pasteur v. Blount*, 51 Fed. Rep. 610.]

Does it mean a decree for a preliminary injunction only, or does it mean any decree short of a final decree? A preliminary injunction is granted, as the name imports, before the case is heard upon the merits, its purpose being to keep things *in statu quo* until the case can be heard and decided. Orders for preliminary injunctions are frequently granted by Circuit Courts in suits upon patents, when the patent has been adjudged valid in another case, or when there has been a long public acquiescence in its validity. The plaintiff presents his case by affidavits, and the defendant is allowed to file affidavits in reply. If the defendant's affidavits are by way of traverse, no further affidavits can be filed; but if they are by way of confession and avoidance, the plaintiff may file affidavits in rebuttal. Upon this evidence the preliminary injunction is granted or refused. The case then goes on, testimony is taken, a final hearing is had, and the court makes a decree, sustaining, we will assume, the validity of the patent, finding that the defendant has infringed, and sending the case to a master to take an account of profits and to assess damages. Is such a decree an "interlocutory" decree, or does "interlocutory" mean a decree for a preliminary injunction? It has been decided that such a decree is an interlocutory decree, and therefore, that an appeal from it can be taken under the clause just quoted, as well as from an order or decree for a preliminary injunction.

The importance of the point will readily be perceived. Under the old law, — the law as it stood prior to 1891, — there was no appeal to the

Supreme Court from the Circuit Court, except from *final decrees*; and a final decree for the plaintiff is not made until damages are assessed. Consequently, prior to 1891, damages had to be assessed before an appeal could be taken, and yet, if the Supreme Court should reverse the decree, there would be, of course, no damages, and the time and money spent in taking them would have been thrown away. An accounting is often, especially in patent suits, a protracted and costly proceeding. In one case, a decree in favor of the patent was rendered in May, 1879. A long contest in the master's office then began, and lasted till June, 1886, when damages to the amount of more than \$150,000 were awarded by the Circuit Court. The case was then appealed to the Supreme Court, and in May, 1891, that court reversed the decree of the Circuit Court, and ordered that the bill should be dismissed. The reports contain many similar cases where defendants were restrained for years from using an invention which, as the Supreme Court finally decided, they had a right to use, and where they were also subjected to great expense in the matter of damages, which, as the Supreme Court finally decided, the plaintiffs had no right to recover. The clause in question was designed to remedy this injustice.

But, as I have indicated, another point has arisen under this clause. When an appeal from an interlocutory decree has been taken to the Circuit Court of Appeals, what shall be the form of the decree made by that court? The decree of the court below was simply a decree for a perpetual injunction, and

to assess damages (not a decree for ascertained damages), or a decree dismissing the bill. If the Circuit Court of Appeals find for the defendant, no difficulty arises; they affirm the decree dismissing the bill. But if they find for the plaintiff below must they merely affirm or reverse the decree of the court below, or, inasmuch as they have heard the whole case, can they go further, and direct the Circuit Court to assess damages and to enter a final decree for the plaintiff? If they cannot do so, then the Circuit Court must make a final decree of its own motion, and an appeal would lie from that again to the Circuit Court of Appeals. The question has been decided in both ways. In the fifth circuit (*Jones Co. v. Munger*<sup>1</sup>) the court held that they had authority only to deal with the decree of the court below for an injunction. The opposite view was taken, after great consideration, in the first circuit in *Richmond v. Atwood*.<sup>2</sup> In view of these conflicting decisions an attempt was made in the 6th Circuit to certify the question to the Supreme Court for its decision, but this attempt failed, by reason of some informality, as the Supreme Court held, in the application to them.<sup>3</sup>

The remaining sections of the Act of 1891 deal chiefly with matters of practice. The 15th section, relating to appeals from the Supreme Courts of the Territories, has already been stated. Section 10

<sup>1</sup> [50 Fed. Rep. 785. See also *Columbus Watch Co. v. Robbins*, 64 Fed. Rep. 384.]

<sup>2</sup> [52 Fed. Rep. 10. See also *Marden v. Campbell Printing Press & Mfg. Co.*, 67 Fed. Rep. 809; *Busill Carpet Sweeper Co. v. Goshen Sweeper Co.*, 72 Fed. Rep. 545.]

<sup>3</sup> [*Columbus Watch Co. v. Robbins*, 148 U. S. 266.]

provides that every case coming by writ of error or appeal to the Supreme Court shall, after its determination in that court, be remanded to the Circuit or District Court in which the case arose, for further proceedings, whether it comes directly to the Supreme Court, or through the Circuit Court of Appeals. And all cases made final in the Circuit Court of Appeals are, in like manner, remanded for final decree to the Circuit or District Courts where they arose. In no case does the Supreme Court or the Circuit Court of Appeals have power to enter a final decree.

Sect. 11 provides that all appeals and writs of error shall be taken or sued out within six months "after the entry of the order, judgment, or decree sought to be reviewed": *Provided, however*, "that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error, in such cases taken to or sued out from the Circuit Courts of Appeal." Since this clause applies only to the Circuit Court of Appeals, it must be held that appeals or writs of error to the Supreme Court from the Circuit or District Courts may be taken, as before the Act of 1891, within two years after the judgment or decree complained of was rendered, except in special cases of disability mentioned in the statute.<sup>1</sup> The remainder of the section provides that all laws in force as to the regulation of appeals and writs of error in the United States Courts shall apply also to the new court.

<sup>1</sup> [See Rev. Stat. § 1008. See also *McDonald v. Hovey*, 110 U. S. 619; *Smith v. Gale*, 137 U. S. 577.]

Sect. 12 provides that the Judges of the court shall have the same power to issue writs which is granted in Revised Statutes, sect. 716.<sup>1</sup>

Sect. 13 provides for appeals from the Indian Territory.

Sect. 14 repeals Revised Statutes, sect. 691, and the Act of February 16, 1875.<sup>2</sup>

The next inquiry is, as to the amount in controversy. There is no money limit to the jurisdiction of the Supreme Court, except in certain Territorial cases, and except also in that small class of suits arising under the following clause of the statute: "In all cases not hereinbefore in this section made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs." Cases arising under this clause are, of course, few in number; but, as we shall see in the next chapter, there is a money limit, in most cases, to the jurisdiction of the Circuit Court, and the following observations of Judge Curtis apply in part to that court as well as to the Supreme Court.]

How are you to ascertain whether the matter in controversy exceeds [one] thousand dollars besides costs? The rules upon this subject are well settled.

In the first place, the matter in dispute must be money, or some right the value of which can be calculated in money; because this sum, [one] thousand dollars, is the measure and standard furnished

<sup>1</sup> [As to writs of prohibition, see *United States, Ex rel. Fisher v. Williams*, 67 Fed. Rep. 384.]

<sup>2</sup> [18 Stat. 316.]

by Congress to determine whether the right of appeal or writ of error exists; therefore, it must be money, or some right the value of which can be calculated in money. You will find this settled in the case of *Ritchie v. Mauro*, 2 Peters, 243. That was a writ of error taken to try the right of a person who claimed to be the guardian of a minor child, and the court held that, inasmuch as this right was not capable of being appreciated, or reduced to appreciation in dollars and cents, there could be no writ of error. Another case was that of *Barry v. Mercein*, 5 Howard, 103, where a father claimed the custody of a child, and the same decision was made, — that the value to the father of the custody of his child was not capable of being measured in money, and therefore the right to an appeal or writ of error did not exist.

In ascertaining whether the matter in dispute exceeds the sum of [one] thousand dollars, exclusive of costs, where money is demanded in the declaration, either as debt or damage, — that is, where an action of debt, under the old forms of pleading, is brought, and a particular sum is demanded; or where an action of *assumpsit* is brought, and damages are demanded, — you are to ascertain, in this class of cases, from an inspection of the record alone, whether the matter in dispute exceeds [one] thousand dollars, exclusive of costs. Here there are certain rules adjudicated, to which I wish to ask your attention. One of these rules is found in the case of *Kanouse v. Martin*, 15 Howard, 208, and it is this: "The settled rule is, that until some further judicial proceedings have taken place, show-



ing upon the record that the sum demanded in the declaration is not the matter in dispute, that sum is the matter in dispute;" — so that, if a plaintiff files a declaration in which he demands more than [one] thousand dollars, that is the matter in dispute until some further judicial proceedings have taken place showing that less than that sum is in dispute.

This implies, what is certainly true, that, before the final judgment in the Circuit Court (and it is only from a final judgment that a writ of error or an appeal can be taken), proceedings may take place which show that the sum demanded in the declaration is not the matter in dispute. You will readily perceive how this may occur. Suppose that in the declaration the sum of [one] thousand dollars is demanded; the proceedings go on to a verdict, and the sum of [five hundred] dollars' damages is found by a jury. Then, so far as the defendant is concerned, that is the only matter in dispute. The question is, whether he must pay that [five hundred] dollars which the jury have found, or whether there has been some error in the proceedings which should relieve him from his payment. Now, he cannot carry that question to the Supreme Court of the United States, because, although the sum of [one] thousand dollars was originally demanded against him, after the verdict it appears that only [five hundred] dollars is the measure of what he can be required to pay; therefore he cannot have a writ of error. But, on the other hand, the plaintiff demanded [one] thousand dollars. If, in the course of the trial, he has taken proper exceptions to rulings of the court reducing his claim, then he

may have these questions re-examined by a writ of error, because his claim was [one] thousand dollars, and that claim has been affected and reduced by the rulings of the court, contrary to what he maintained, and therefore he may have a writ of error under these circumstances, although the defendant cannot.

I believe this will give you an idea of how the question is to be tested, and decided, in regard to the amount in controversy being more than [one] thousand dollars, exclusive of costs, where it is a money demand.<sup>1</sup>

But you will readily see that a great many cases come to judgment in the Circuit Courts which are not money demands. There are cases *in rem*. An action is brought to recover a piece of land, or to

<sup>1</sup> In a very recent case, where the defendant had pleaded neither a set-off nor a counter claim, the plaintiff remitted so much of a verdict in his favor as was in excess of \$5,000, and took judgment for the remainder "in coin," and the defendant sued out a writ of error, it was held that the amount in controversy, whether payable in coin or any other kind of money, was not sufficient to give the Supreme Court jurisdiction. *Thompson v. Butler*, 95 U. S. 694. Other cases on this subject are *Milner v. Meek*, 95 U. S. 252; *Telegraph Company v. Rogers*, 93 U. S. 565; *Schacker v. Hartford Fire Ins. Co.*, 93 U. S. 241; *Yznaga v. Harrison*, 93 U. S. 233; *Terry v. Hatch*, 93 U. S. 44; *The Rio Grande*, 19 Wallace, 178, — *prima facie*, the judgment against a defendant in an action for money is the measure of the jurisdiction of the Supreme Court in his behalf. This *prima facie* case continues until the contrary is shown; and if jurisdiction is invoked, because of the collateral effect a judgment may have in another action, it must appear that the judgment conclusively settles the rights of the parties in a matter actually in dispute, the sum or value of which exceeds the required amount. *Troy v. Evans*, 97 U. S. 1. [A counter-claim made by the defendant is reckoned as a part of the sum involved. *Buckstaff v. Russell*, 151 U. S. 626.]

recover possession of a vessel. There are a great variety of cases where the proceedings are *in rem*, and there is no opportunity to show upon the record the precise amount of damages or debt demanded, or to state the value of the property in question, and where, therefore, there must be a different rule applied.<sup>1</sup>

If the nature of the proceeding in equity or admiralty depends upon a statement of the value of the thing demanded on the record, that mode may be resorted to. It is not usual to resort to it, — perhaps I may say it is unusual, — but it may be resorted to. An allegation in such a case, as, for instance, in a real action, that the land demanded was of greater value than [one] thousand dollars, would be an appropriate allegation, for the purpose of laying the foundation for an appeal. It is not a necessary foundation; the Supreme Court, if the amount in controversy is questioned, will receive affidavits in that court of what the value is, provided they are seasonably made. They will not allow a party to come there with an appeal or a writ of error, and suffer his case to remain for one term after another (and unfortunately the cases

<sup>1</sup> Where a respondent in an admiralty suit elected to reduce the amount of a decree to a sum below \$2,000, by claiming the benefit of a set-off, and at the same time stated in writing that he did it without waiving his right of appeal, it was held that, as the final decree was for a less sum than \$2,000, there could be no appeal. *Sampson v. Welsh*, 24 Howard, 207. Although in cases in admiralty sounding in damages, as for personal wrongs, the damages claimed in the libel may be much larger than the jurisdictional sum, the right of appeal must be determined by the amount found in the final decree. *The D. R. Martin*, 91 U. S. 365.

have to remain there one term after another, because the docket is so crowded), and then at last come in with affidavits at the end, perhaps, of one, two, or three years. The affidavits must be seasonably made. You will find this rule laid down in the case of *Richmond v. The City of Milwaukee*, 21 Howard, 391.

You must bear in mind that neither cost nor interest can be included in this amount of [one] thousand dollars. The sum demanded, at the time when it was demanded, must be upwards of [one] thousand dollars, and an increase of it afterwards, during the pendency of the litigation, by accruing interest or an increase of the amount for which judgment is rendered by reason of costs, will not raise the sum demanded above [one] thousand dollars. This was settled in the case of *Walker v. The United States*, 4 Wallace, 163.

Another requirement is, that the judgment or decree must be final. "From all final judgments and decrees," and from no others, can appeals or writs of error be taken. Now, in reference to judgments at law, there is no real difficulty in ascertaining whether they are final. When a judgment at law is rendered on which an execution can issue, that is final; when the execution is put in force, that may deprive the party of his money. A judgment, therefore, on which an execution can issue at law, is a final judgment, and nothing short of it is so.<sup>1</sup> Notwithstanding this, which is now plain enough, there have been a great number of decisions

<sup>1</sup> [A judgment overruling a demurrer is not a final judgment. *Werner v. Charleston*, 151 U. S. 360.]

upon this subject, because practitioners have not perceived clearly the nature and extent of this requirement. I will refer you to a few of them, and you will see to what a recent time they come down. A refusal to grant a continuance of the cause, a refusal to grant an amendment of a declaration, or a new trial, are not final judgments. If you will refer to the case of *Boyle v. Zacharie*, 6 Peters, 635, and also to the case of *Henderson v. Moore*, 5 Cranch, 11, you will see instances of this kind. Also, a refusal to quash an indictment in a criminal case is not the subject of a writ of error.<sup>1</sup> *The United States v. Avery*, 13 Wallace, 251. These cases all depend upon the same principle. An application for a continuance, or to amend a declaration, or quash an indictment, is an application to the discretion of the court; and a writ of error cannot bring before the Supreme Court of the United States any question of discretion, — it only brings up questions of law. And the same thing is true, in a larger sense, of an application for a new trial; for although the granting or refusal to grant a new trial depends ordinarily upon the application of principles of law to the facts brought before the court, according to the practice of the court, in one mode or another, still it is a discretionary authority. It is so recognized, and the

<sup>1</sup> [When a writ of error or appeal has been taken from an inferior court to the highest court of a State, and the latter court remands the case for a new trial, that is not a final judgment or decree. *Parcels v. Johnson*, 20 Wall. 653; *Union Mutual Life Insurance Co. v. Kirchoff*, 160 U. S. 374. But a refusal of the highest court of a State to grant a writ of error to an inferior court may be a final judgment. *Clark v. Pennsylvania*, 128 U. S. 395.]

court will sometimes, even where the strict principles of law would dictate a new trial, refuse it, because justice has already been done, and therefore in none of these cases can a writ of error be taken.<sup>1</sup>

Passing from the subject of final judgments at law, about which there would seem to be very little difficulty, the same remark, I think, may be made with reference to the admiralty, because decrees in admiralty are simple. They ascertain the fact, and give effect to it, that a party is entitled to a sum of money, or that he is entitled to the possession of a vessel, or some other thing which is quite determinate, and which is final in its character; therefore very few disputes have arisen concerning the finality of decrees in admiralty as the foundation of appeals. I might mention, however, that it is just as true in admiralty as it is at the common law, that there must be a decree upon which some execution can issue, before it is final. For instance, a hearing is had in admiralty in a collision case, where damages are demanded because one vessel has negligently injured another. The court examine the evidence, apply the principles of law to the facts which they find, and they decide in favor of the libellant, — that the vessel of the libellant was injured by the negligence of the vessel of the claimant. That might seem at first view to be final enough. It is ascertained that the claimant must pay damages, but that is not final in the sense of

<sup>1</sup> See further, as to final judgments, *Moore v. Robbins*, 18 Wallace, 588; *St. Clair County v. Livingston*, Ib. 628; *McComb v. Commissioners of Knox County*, 91 U. S. 1; *Baker v. White*, 92 U. S. 176; *Davis v. Crouch*, 94 U. S. 514.

this law. There must be reference to an assessor, as he is commonly called in admiralty, to ascertain the damages, and when those damages are ascertained, then another decree is entered, that the claimant shall pay them, and until that decree is entered the judgment is not final. As I have said, very few disputes have arisen on this subject. I do not, at this moment, remember any case in which there has been difficulty in regard to the finality of a decree in admiralty; but it is very much otherwise with decrees in equity, because a court of equity is capable of moulding its decrees into so many forms, and applying them to so many different states of fact, according to the equity of the particular case; and great numbers of cases have been decided upon the question whether a decree in equity was sufficiently final to allow an appeal. I can state to you certain principles which I believe will be sufficient for your guidance upon this subject, and will refer you to some of the decisions.

In the first place, a decree in equity may be final without being complete. If it deprives the defendant of his property, or his money, finally, so far as regards that court, then he may appeal, although there remain certain things to be done in the case before it will be ended;<sup>1</sup> but, on the other hand, if the decree in equity only changes the possession of

<sup>1</sup> ["It may be said in general that if the court make a decree fixing the rights and liabilities of the parties, and thereupon refer the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it refer the case to him as a subordinate court and for a judicial purpose, as to state an account between the parties upon which a further decree is to be entered, the decree is not final." *McGourkey v. Toledo & Ohio Ry.*, 146 U. S. 536.]

the property or money temporarily, then it is not final. Let me state a case which will illustrate each of these principles. The decree may be final without being complete; as, for instance, suppose a court of equity should require the defendant in a case to hand over the title deeds, or any other property, for which the suit was brought, because the complainant is entitled to them, or because it adjudicates that he has a right to them; and it requires the respondent in equity to execute or give effect to that right, and pass the property over to his opponent, — that is a final decree, although there may remain many things to be done in the cause. On the other hand, suppose a court of equity, finding some property unsafe in the hands of the holder, should make an order that he should hand it over to a receiver; or, if it were moneys or papers, that he should deposit them in the court with the clerk or registrar; — that is not final, because he has not been deprived of his property finally by a decree of the court, in the execution of principles which the court considers applicable to the case, but the court has interposed and changed the possession of the property simply to preserve it for whom it may ultimately concern, and therefore that would not be a final decree. If you will refer to the cases of *Forgay v. Conrad*, 6 Howard, 201; *Thompson v. Dean*, 7 Wallace, 342; and *Stovall v. Banks*, 10 Wallace, 583, you will find these principles stated and explained.<sup>1</sup>

<sup>1</sup> A final decree of a Circuit Court confirming a sale made under its order may be appealed from. *Blossom v. Railroad Company*, 1 Wallace, 655; *Sage v. Railroad Company*, 96 U. S. 712.



The next inquiry is, Who are to be parties to a writ of error, or an appeal? The general answer is, all parties on the record who are interested to reverse the judgment or decree must be parties to the writ of error or appeal; but if one or more of these parties refuse to unite in a writ of error or an appeal, and this fact appears of record, the remaining party or parties may prosecute. So that, if there are two parties to a suit, where the judgment or decree is against them, and one desires to appeal, and the other refuses, it is necessary to get that fact upon the record. When you have done so, then the remaining party may prosecute his writ of error or appeal. That was settled in the case of *Masterson v. Herndon*, 10 Wallace, 416.<sup>1</sup> And there may be cases where a party, although he is a joint party for some purposes, has nevertheless a distinct interest controlled by the judgment or decree. It is difficult to suppose a case where one of two joint parties could have a distinct interest at law, but it is not at all difficult to suppose that one of two joint parties may have a distinct interest in equity, controlled by a decree, and in that case he alone may take the appeal. This was settled in the case of *Todd v. Daniel*, 16 Peters, 521, and the court at the same time held in that case that if several appeal, and some refuse to prosecute, but the remaining party desires to prosecute, the Supreme Court will pronounce the appeal deserted by the others, and hear the appeal of the one who desires to be heard.<sup>2</sup>

<sup>1</sup> [*Sipperley v. Smith*, 155 U. S. 86.]

<sup>2</sup> All the parties against whom a joint judgment or decree is rendered must join in the writ of error or appeal, or it will be dis-

The right to take an appeal is an absolute right. It is not necessary to apply to a judge to allow an appeal, in order to obtain the right to appeal, but, at the same time, it has been held by the Supreme Court—for reasons which are not fully explained, and which I must say I do not myself fully understand—that an appeal must be allowed by a judge. This was held in the case of *Barrel v. Transportation Company*, 3 Wallace, 424, and in the case of *Pierce v. Cox*, 9 Wallace, 786. But while they held that an appeal must be allowed in order to be effectual, they held it also to be an absolute right, not depending upon judicial discretion, and they will enforce that right by a writ of mandamus in any proper case. Suppose, for instance, that a party has a right to an appeal. He claims it, and the judge of whom he claims it refuses to allow it. Then the Supreme Court say they will issue their writ of mandamus to that judge, commanding him to allow it. That was held in the case of *The United States v. Adams*, 6 Wallace, 101; and there is an earlier case, *The United States v. Gomez*, 3 Wallace, 752.<sup>1</sup>

An appeal may be claimed, and allowed by a judge, either in court or out of court, in term time

missed, unless sufficient cause for the non-joinder be shown. *Simpson v. Greeley*, 20 Wallace, 152; *Williams v. Bank*, 11 Wheaton, 414; *Masterson v. Herndon*, 10 Wallace, 416.

<sup>1</sup> § 692 of the Revised Statutes used the peremptory language that “an appeal shall be allowed to the Supreme Court from all final decrees of any Circuit Court, etc., . . . where the matter in dispute exceeds, etc., and the Supreme Court is required to receive, hear, and determine such appeals.” The most recent case in which a mandamus has been granted, directing the Circuit Court to allow an appeal, is *Ex parte Railroad Company*, 95 U. S. 221.

or vacation. But there is an important difference between an appeal claimed after the expiration of the term, and out of court, and one claimed in court at the term when the decree was rendered; because, in the latter case, it is not necessary to take out any citation. The claim and allowance of the appeal at the term when the decree was rendered is sufficient notice to the opposite party that an appeal has been taken, and that he must attend to its prosecution. On the other hand, if the appeal is not claimed at the term when the decree was entered, and in open court, a citation to answer to the appeal in the Supreme Court must be taken and served, according to the requirements of the law in that behalf.

Writs of error, where they are taken under this Act of Congress, are issued by the clerk of the Circuit Court usually, — he is authorized by the statute to do so, — although they may be issued by the clerk of the Supreme Court. It is, of course, far more convenient for local practitioners to apply to the clerk of the Circuit Court, than to apply to the clerk of the Supreme Court; therefore, in ninety-nine cases out of a hundred, the writ of error is issued by the clerk of the Circuit Court of the district where the judgment was pronounced.

Much strictness of practice obtained at an early day in the Supreme Court concerning forms of writs of error, and requirements in regard to certificates and returns. But this same act to which I have already referred, of the 1st of June, 1872, contains in its third section a very broad statute of jeofails, and it is difficult to see, on reading it,

what defect cannot now be amended in the discretion of the court, if they think proper to allow it. There are always two contending forces on this subject, — one, of those who desire to discourage laxity, and produce accuracy of proceedings; and the other, of those who make allowances for laxity, and perhaps some degree of carelessness, and pass it over, if possible. The court seem formerly sometimes to have taken the first direction; Congress has certainly, in this act, taken the second, very decidedly.<sup>1</sup>

There are two other subjects which I ought to speak of this evening, and which will not occupy much time; one is, appeals from the Circuit Court under the Bankruptcy Act. The second section of the Bankruptcy Act, which is found in 14 Statutes at Large, 518, gives the Circuit Court general superintendence over all questions and cases arising under that act in the District Court. You are aware that the District Court (I shall come to that hereafter in the course of these lectures) has original jurisdiction in cases of bankruptcy, and this section gives the Circuit Court general superintendence over all questions and cases arising under that act in the District Court, in the nature of an appeal; and the section also goes on to give the Circuit Court concurrent jurisdiction with the District Court over all suits at law, or in equity, by or against any assignee touching the property, or rights of property, of the bankrupt. You will see that these are perfectly distinct: the one is a

<sup>1</sup> See § 1005 of the Revised Statutes, re-enacting the third section of the Act of June 1, 1872.

jurisdiction by the Circuit Court to superintend the proceedings of the District Court, and see that they are right; the other is a jurisdiction concurrent with the District Court, to entertain suits by the assignee of a bankrupt, or against the assignee of a bankrupt, concerning any property, or rights of property, of a bankrupt. Well, in the case of *Morgan v. Thornhill*, 11 Wallace, 65, the Supreme Court decided that it had appellate jurisdiction over the second of these classes of cases, and not over the first; that, if a party should apply to the Circuit Court by a petition, and suggest that the District Court had committed an error in some bankruptcy proceeding, and the Circuit Court should thereupon look into the matter, and decide one way or the other, there can be no appeal to the Supreme Court, — that would be final.<sup>1</sup> On the other hand, under this second clause of the section, if an assignee in bankruptcy brings a suit against a third person touching any property, or right of property, of the bankrupt, or if a third person brings a suit against the assignee, then there could be appellate jurisdiction in the Supreme Court; provided the amount in controversy was sufficient.<sup>2</sup>

In order to get an appeal or a writ of error into

<sup>1</sup> This subject is now regulated by the Revised Statutes, substantially as stated in the text. See §§ 4979–4989, and the cases of *Wiswall v. Campbell*, 93 U. S. 347; *Hill v. Thompson*, 94 U. S. 322; *Milner v. Meek*, 95 U. S. 252; *Nimick v. Coleman*, *Id.* 266. [This supervisory power of the Circuit Court still remains, being unaffected by the Act of 1891, which took away the appellate jurisdiction of the Circuit Court. *In re Briggs*, 61 Fed. Rep. 498.]

<sup>2</sup> [The appeal is now to the Circuit Court of Appeals, and probably there is no money limit to it. *In re Briggs*, *supra*. But see *Huntington v. Saunders*, 72 Fed. Rep. 10.]

the Supreme Court of the United States, it is necessary to apply to the clerk of the Circuit Court, who makes out a transcript of the record, and, if it is a writ of error, annexes it to the writ, and that operates as a return of the writ. Then, counsel should take that transcript, whether it be annexed to the writ of error, or simply a transcript of the proceedings in equity or admiralty, on appeal, and forward it to the clerk of the Supreme Court at Washington. This may be done at any time. It is not necessary that it should be sent to him in term time; it is not necessary that he should enter it on his calendar in term time. The practice is for him to receive it, and enter it whenever it is sent. It must be sent within the first six days of the term to which it is returnable; otherwise a motion to dismiss the appeal or writ of error may be made; but it may be sent at any time during vacation. It must be accompanied, according to the rules of the court, by a bond, in the sum of two hundred dollars, with sufficient surety to secure the fees of the clerk, — a provision which was found to be necessary, because, in so large a country as ours, these records coming from so great distances, the clerk could not be reasonably secure of being paid his fees without some bond or deposit of money; and he accepts money in lieu of the bond, if it is desired.

There are two contingencies in which it may be necessary to use other processes, after the writ of error, or the appeal, is entered. Suppose, for instance, that a portion of the record has been omitted by mistake. A party on examining the

record finds that something is not there which should be there, and which is important to him. He has a right at the first term of the court to suggest that there is a diminution of the record, as it is technically termed, and move for a writ of *certiorari*, to be directed to the clerk of the court below, directing him to send up what he failed to send the first time; and that is necessary, in ordinary practice, quite frequently.

I might mention in this same connection, that each Friday of the term is set apart as "motion day," and on that day counsel, by giving notice to their opponents, can be heard upon any motion, either to dismiss a writ of error, or an appeal, for want of jurisdiction, or a motion for a writ of *certiorari*, or any other motion necessary in a cause.<sup>1</sup>

There is another class of appeals which you may hereafter be interested to understand, and that is, from the Court of Claims. The Court of Claims, you are aware, is established by Congress, at Washington, for the purpose of adjudicating on certain classes of claims against the government, and it is a court of great importance, and disposes of very large amounts of property. I will give you a reference to the statutes by which it was established: 14 Statutes at Large, 9, 44; 15 Statutes at Large, 75. These are the laws by which the present constitution of that court is regulated. It was originally established by an act, which is now repealed, in 10 Statutes at Large, 612, and there have been two acts of amendment which it is important to consider, if you look into the subject. One is

<sup>1</sup> By rule of the Supreme Court, motion day is now Monday.

found in 12 Statutes at Large, 765; the other is in 14 Statutes at Large, 9, — I have already given you that.

Now, there have been some decisions of the Supreme Court upon the construction of those laws which it may be useful for you, if you look into this subject, to read. They are *Gordon v. The United States*, 2 Wallace, 561; *Ex parte Zellner*, 9 Wallace, 244; *De Groot v. The United States*, 5 Wallace, 419; and *The United States v. Adams*, 9 Wallace, 661. If you have any occasion to inquire into the constitution of this court, and the mode by which it is connected with the Supreme Court by way of appeal, I believe you will find that these references will give you the necessary information.<sup>1</sup>

There is only one other topic about which I will say a few words, and that is the courts of the Territories. The laws of Congress organizing the different Territories from time to time have always provided for the constitution of appropriate courts in those Territories; but it is settled that these are not courts of the United States under the Constitution of the United States. They are what are called "Congressional Courts," established by force of the authority conferred on Congress to make all needful rules and regulations concerning the territory and other property of the United States. The judges of those courts do not hold during good behavior; they hold for a term of years. And there are various other provisions in the acts constituting the courts, which distinguish them from the courts

<sup>1</sup> See §§ 707, 708 of the Revised Statutes. [See also *United States v. Jones*, 119 U. S. 477.]



of the United States. Nevertheless, there is an appeal from the highest courts of the Territories to the Supreme Court of the United States, and you will find this subject treated historically, and with great clearness, by the present Chief Justice, in the case of *Clinton v. Englebrecht*, 13 Wallace, 434, where he shows what the nature of these courts is, how they are constituted, how they differ from courts under the Constitution of the United States, and how they have been regulated, historically and actually, from the very origin of the government.<sup>1</sup>

<sup>1</sup> See §§ 702, 703 of the Revised Statutes. [See also *supra*, p. 79. The appeal now lies, in some cases, as we have seen, to the Circuit Court of Appeals; and this is true of cases brought in the Circuit Court by the Interstate Commerce Commission. *Interstate Commerce Commission v. Atchison, Topeka, &c. R. R. Co.*, 149 U. S. 264.]

## CHAPTER IV.

## THE CIRCUIT COURTS.

THE original constitution of the Circuit Courts of the United States, by Congress, was made by the Judiciary Act of September 24, 1789. The growth of the country and the great increase of business of these courts have led, from time to time, to some changes; not in the structure and plan of the courts themselves, but to some expansion of their powers, and of the means for working them, to which reference may hereafter be made in the course of these lectures. But my present object is to describe to you what the general plan of these courts now is, without adverting to the changes which have been made in their structure since they were first established. I ought, however, to say, I think, that there has been no substantial change in the general structure and plan of these courts, or their relations to other courts, since they were established; and certainly the fact that this plan has been found to continue applicable and preferable under such vast changes of circumstances as have occurred between 1789 and the present day, shows, in the most conclusive manner, the wisdom of those by whom the plan was originally framed. And this general plan has not remained the same from want

of attention to the subject; on the contrary, it has undergone, at various periods, the most searching and comprehensive examination; but notwithstanding there have been those, in Congress and out of Congress, who have set out with the idea that they could improve that plan, they have always come back to the conviction, or, at any rate, those who are clothed with the power to make changes have come back to the conviction, that no considerable changes could be made for the better; and these courts have remained to this day very much, in their general structure, in their jurisdiction, and in their relations to other courts, what they were as constituted in September, 1789.

The purpose of this lecture, as I have said, is to exhibit to you this general plan, as it now exists; what are the means for working it, and what is the jurisdiction which is exercised by it; and by what judges, and through what rules of practice, this jurisdiction is applied. They who framed this system had five principal things to consider: first, the territorial divisions within and for which these courts were to act; second, the *personnel* of the courts, — what judges were to constitute them; third, what jurisdiction should be assigned to them, — what parts of the judicial power of the United States these courts should exercise; fourth, whence should they derive their pleadings, their practice, and their rules of decision; and, fifth, what should be their relation to other courts. All these particulars the framers of this plan had to consider, and however obvious and clear it may now seem to us each would be, still at the time

when the Act of 1789 was passed it was an open field; and the authors of this judiciary system of the United States, so far as it was the subject of Congressional legislation, were at liberty to move in any direction. And when you look back to the guides and landmarks which might indicate one or the other course as proper, they will be found to be exceedingly few. To me it is a subject almost of wonder that they should have made so few mistakes, and that in dealing with a subject so vast as this, in which they had so few guides, they should have taken the direction they did, and followed it so comprehensively and so steadily that it is almost impossible, with the wisdom that we have derived from experience since, to make any change for the better.

The first of these questions to which I have adverted was, what territorial divisions they should establish, within and for which these courts should be held. The Constitution was silent on the subject; it committed the entire power to Congress, and it was for Congress to fix upon some unit of territorial division within and for which these Circuit Courts should be held. You know that the unit of territorial division in England, and in each of the several States, at the time when this act was passed, was the county. What should be their unit, was the question they had to consider; and they fixed on the State as the unit, to be divided when and as circumstances should require; and as an exemplification of the principle, that, while each of the several States should be considered the unit of territorial division, still local interests were to

be regarded, they made what was known at that time as the District of Maine, which was a part of Massachusetts, a District by itself. They also made a separate judicial District of Kentucky, which at that time was part of the State of Virginia. I mention this as showing that the framers of this act foresaw that, while they adopted the State as the territorial unit of the division of the country, within and for which the Circuit Courts were to be held, they nevertheless contemplated, and actually carried into effect, a still further division in the manner which I have mentioned; making the District of Maine and the District of Kentucky separate judicial Districts. And that policy has been carried out since, in accordance with this original plan, so that, whenever the wants of a part of a State have required, for the distribution of justice among the people, and for the execution of the criminal laws of the United States, a further division of the territory of the State, that division has been from time to time made, and is in perfect harmony and accordance with the original plan. Thus, in the State of New York at the present time, there are three different Districts, and it is contemplated, I believe, to make a fourth, and so in several of the other States;<sup>1</sup> but these divisions into different Districts are not merely in harmony with the original plan, as enacted in the manner I have mentioned, which erected certain separate Districts within the States, but they are also — as you will perceive as I proceed — in har-

<sup>1</sup> [The only States divided as yet into three Districts are Alabama, New York, Tennessee, and Texas.]

mony with those principles in reference to the application of local law, which the framers of this act had in view at the time when it was passed.

The next question which they had to consider with reference to this matter of the territorial division of the country was how far should the processes of these courts run. The Constitution and laws of the United States prevail throughout the whole territory of the United States, and are binding upon every individual citizen; but the question which they had to consider, as a practical question, was, how far should the processes of each of these Circuit Courts, held within and for each of these Districts, run, in order to carry out, in the most effectual manner consistent with the liberty and convenience of the citizen, the purposes which were had in view in establishing the courts.

They decided, in the first place, that the assertion and maintenance of the criminal laws of the United States required that the processes of these courts should run everywhere within the territory of the United States; that wherever a criminal might be, he should be subject to arrest by a warrant from that Circuit Court of the United States which, under the Constitution and laws, had jurisdiction to try him, and therefore a bench warrant would run from Massachusetts to the most extreme part of the territory of the United States, to arrest a criminal who was indicted in the Circuit Court, and bring him before that court for trial. In that particular, the powers of the court had no territorial limits, except those of the United States; and in accordance with this, a process by

which witnesses could be brought before the court in criminal trials ran throughout the entire territory of the United States. This was provided for in the Judiciary Act, to which I have already referred, and those provisions have always remained the same.<sup>1</sup>

The next thing to be considered was, what criminals should be subject to the jurisdiction of each of these courts. The Constitution contained a provision which had some bearing on this subject, in its third article, which I will read: —

“The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.”

It was found, on examination, that this was a defective provision; and accordingly the sixth amendment of the Constitution made further provision to this effect: —

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.”

So far as regards the territorial jurisdiction of these courts, it is that he is to be tried “by an

<sup>1</sup> See Revised Statutes, § 1014.

impartial jury," in the "District wherein the crime shall have been committed, which District shall have been previously ascertained by law." Neither of these provisions, however, has any reference to crimes committed out of the limits of any State. They are expressly confined to crimes committed in a State, and in the case of *United States v. Dawson*, 15 Howard, 467, the Supreme Court of the United States decided that neither of these provisions of the Constitution had any reference to crimes committed in the Indian country, out of the limits of any State or of any organized Territory of the United States.

Now, these being the provisions of the Constitution under which, and in subordination to which, Congress must of course legislate, they passed the Act of the 30th of April, 1790, which is found in 1 Statutes at Large, 114, § 8. It is the close of that section: "The trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the District where the offender is apprehended, or into which he may first be brought." Now, there is a very large criminal jurisdiction exercised by the Circuit Courts of the United States over offences committed on the high seas, or against laws passed by Congress under their authority to regulate commerce, and to define and punish piracy and offences against the laws of nations; and in all that class of cases, as well as cases of crimes committed out of any State or Territory, on the land, which are still offences against the laws of the United States, the criminal is to be tried in the Circuit Court of that District



into which he is brought as a prisoner, supposing him to have been arrested abroad or on the high seas, or where he may first be arrested, if he has come voluntarily within that jurisdiction. So that all these provisions of the Constitution to which I have referred in regard to the trial of crimes committed within the States, are followed out and obeyed by trying criminals in that Circuit Court which is held in a District previously ascertained by law, within the limits of which the crime was committed, provided the crime was committed within the limits of a State. On the other hand, if it was on the high seas, or out of the limits of any State or organized Territory, then the Circuit Court has jurisdiction over the criminal, provided he was first brought compulsorily within their jurisdiction, or came voluntarily within it and was there arrested.<sup>1</sup>

This Act of April 30, 1790, was re-enacted, without change, by what is now the existing law of March 3, 1825, found in 4 Statutes at Large, 118, § 14. That Act of March 3, 1825, was a revision and re-enactment, with some changes and additions, of the criminal laws of the United States. The author of it was Mr. Webster. It is an act drawn with great precision and clearness, which has given rise to very few questions upon its language, or upon the meaning and effect of its provisions, and it is now the existing general criminal statute of the United States.<sup>2</sup>

<sup>1</sup> As to the district into which the criminal is first brought, see *United States v. Arwo*, 19 Wallace, 486.

<sup>2</sup> See Revised Statutes, Title LXX., Crimes.

I think this is all I need say to you in regard to the jurisdiction of the Circuit Courts over criminals, except to add, what I shall explain somewhat hereafter, that the Circuit Court of the United States has, under the eleventh section of the Judiciary Act, general jurisdiction over all crimes and offences against the laws of the United States. It is a jurisdiction concurrent with that which belongs to the District Courts, and I shall speak more particularly of it when I come to speak of the District Courts, because there are various provisions in regard to remitting indictments from one court to another which it will be necessary to notice, and I think it can be better done in that connection.

I will now ask your attention to the civil jurisdiction of these courts.

[The present law upon this subject was enacted August 13, 1888,<sup>1</sup> being an amendment or correction of the Act of March 3, 1887. The Act of 1887 was an amendment of the Act of March 3, 1875, which will be stated presently. It was passed by Congress in a hurry upon the last day of the session, and it was so ambiguous, and in fact unintelligible, that it was found necessary to correct it by the Act of 1888, which runs as follows:

“The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law, or in equity [1] where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2000, and arising under

<sup>1</sup> [25 Stat. chap. 866, p. 433.]

the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, [2] or in which controversy the United States are plaintiffs or petitioners, [3] or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, [4] or a controversy between citizens of the same State claiming lands under grants of different States, [5] or a controversy between citizens of a State, and foreign States, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid; [6] and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the District Courts of the crimes and offences cognizable by them. [7] But no person shall be arrested in one District for trial in another in any civil action before a Circuit or District Court; [8] and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other District than that whereof he is an inhabitant,<sup>1</sup> but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the District of the residence<sup>1</sup> of either the plaintiff or the defendant; [9] nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover

<sup>1</sup> ["Inhabitant," in this Act, is synonymous with "resident." *Bicycle Stepladder Co. v. Gordon*, 57 Fed. Rep. 529.]

the contents of any promissory note, or other *choses in action*, in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

The next paragraph refers to the removal of causes from the State courts to the Circuit Court, a subject which will be considered later.

Sect. 2. Provides that receivers, appointed by a United States Court, shall manage the property in their charge according to the laws of the State in which it is situated; and a penalty is provided for the violation of this law.

Sect. 3. Provides that a suit against such a receiver may be brought without leave of the court; "but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."<sup>1</sup>

Sect. 4. Provides that National Banks shall, for the purpose of suit, be deemed citizens of the States where they are located; and that the Circuit and District Courts shall have over suits by or against them the same jurisdiction only as if they were individuals. But "the provisions of this sec-

<sup>1</sup> [See *Rouse v. Hornsby*, 161 U. S. 588. By Revised Statutes, sect. 629, the Circuit Courts have jurisdiction "of all suits at common law where the United States, or any officer thereof, suing under the authority of any Act of Congress, are plaintiffs." This clause includes Receivers appointed by United States Courts; but as to whether it includes Receivers of National Banks appointed by the Comptroller of the Treasury, see *Thompson v. Pool*, 70 Fed. Rep. 725.]

tion shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

Sect. 5. Expressly saves Revised Statutes, sections 641, 642, 643, 722, and Title 24 (as to Crimes) and Sect. 8 of the Act of March 3, 1875, of which this act is an amendment, and also the Act of March 1, 1875, relating to Civil Rights.

Sect. 6. Repeals the last paragraph of sect. 5 of the act of which this is an amendment, and also Revised Statutes 640, "and all laws and parts of laws in conflict with the provisions of this act."

The District in which suit may be brought is regulated in certain cases by Revised Statutes, sections 740-742, which were not repealed by the present act. These sections provide: (1) that when a State contains more than one District, every suit, not of a local nature, must be brought in the District where the defendant resides; (2) that in suits of a local nature, where the defendant resides in a different District from that where the suit is brought, but in the same State, process may be served upon him in his own District; and (3) that in a suit of a local nature, when the land, or other subject-matter lies partly in one District and partly in another, suit may be brought in either District.

The law upon this subject of the jurisdiction of the Circuit Courts has been changed twice since the lectures of Judge Curtis were delivered. At that time the statute governing the jurisdiction of the Circuit Courts was the Act of 1789, — the

original Judiciary Act. In 1875 a new act was passed, which considerably enlarged the jurisdiction. Then came the present act (that of 1887-1888), the object of which was to restrict the jurisdiction, and which radically changed the statute of 1875. The present law closely resembles that of 1789. All of these acts, and especially the act now in force, have been the subject of much litigation; so that the student, in reading any case upon the subject, should be careful to note the date of it, and to ascertain under which of these several statutes it arose. It might be well to mention here the chief differences between them. In the Act of 1789 the money limit was \$500, and it remained the same in the Act of 1875; whereas it is now \$2000. In the Act of 1789 the jurisdiction, except when the United States were plaintiffs or petitioners, depended entirely on citizenship, the language being as follows: "Of all suits of a civil nature at common law and in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between a citizen of the State *where the suit is brought*, and a citizen of another State." By the Act of 1875, this jurisdiction was enlarged so as to embrace all suits arising under the Constitution or laws of the United States, regardless of the citizenship of the parties, provided only that the sum of \$500 was involved, and the Act of 1875 also included all suits "in which there shall be a controversy between citizens of different States."

Under the Act of 1875, therefore, a suit of any kind, which involved \$500 or more, might be brought in any Circuit Court of the United States, provided only that it was between citizens of different States. The concluding section of the Act of 1875, that relating to *choses in action*, also made the jurisdiction much wider than it was under the Act of 1789, and much wider than it is under the Act of 1888. These differences will appear when we come to consider that section in detail.

It will be observed that the present statute confers jurisdiction in the following classes of cases: (a) cases where a Federal question is involved; (b) cases where the United States are plaintiffs or petitioners; (c) cases where citizens of the same State claim land under grants of different States; and finally (d) various cases where the jurisdiction depends upon citizenship. It is plain from a careful reading of the section that the money limit does not apply to cases (b) where the United States are plaintiffs or petitioners; and there is a decision to this effect.<sup>1</sup> It might seem also that it does not apply to those cases (c) where citizens of the same State claim lands under grants from different States. But there is a later provision of the same act which makes it probable that the intention of Congress was not to except these cases from the general rule.<sup>2</sup>

Under this statute, therefore, except where the

<sup>1</sup> [*United States v. Shaw*, 39 Fed. Rep. 433. This construction has since been approved by the Supreme Court. See *United States v. Sayward*, 160 U. S. 493.]

<sup>2</sup> [See *infra*, pp. 189-190.]

United States are plaintiffs or petitioners, the Circuit Court cannot take jurisdiction unless the sum or value of more than \$2000 is involved. It is not necessary that more than \$2000 should be recovered: a less sum may have been recovered, but the jurisdiction attached if a sum greater than \$2000 was claimed by the plaintiff, in good faith, in his declaration at law or bill in equity.<sup>1</sup> If, indeed, it is apparent on the plaintiff's own showing, in his declaration or bill, that, even if he should prevail, the law could not give him a sum equal to the jurisdictional amount, the court will not take jurisdiction; but, on the other hand, if the sum recoverable is indefinite, then the plaintiff may fix it in his declaration or bill at an amount which it is morally impossible for him to recover. The distinction was admirably stated in a very early case<sup>2</sup> by Chief Justice Ellsworth as follows:—

“In an action of debt on a bond for £100, the principal and interest are put in demand; and the plaintiff can recover no more, though he may lay his damages at £10,000. The form of the action, therefore, gives in that case the legal rule. But in an action of trespass, or assault and battery, where the law prescribes no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion to which, from the nature of the action, we can resort in settling the question of jurisdiction. The propo-

<sup>1</sup> [*Greene v. Lister*, 8 Cranch, 229.]

<sup>2</sup> [*Wilson v. Daniel*, 3 Dall. 401.]



sition, then, is simply this: where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded."

And so it is held that the jurisdiction attaches, if the proper sum be claimed, even though it is apparent on the face of the plaintiff's pleadings that there is a valid defence to his suit. "For who can say, in advance, that that defence will be presented by the defendant, or, if presented, sustained by the court?"<sup>1</sup>

It was provided under the old law, by Revised Statutes, sect. 968, that when the plaintiff recovered less than \$500, he should not recover costs, and that he might, in the discretion of the court, be adjudged to pay the whole costs. This provision, not having been repealed by the Act of 1887-1888, is still in force; and the amount, \$500, which was the money limit under the previous laws upon this subject, cannot, by implication, be changed to \$2000.<sup>2</sup>

Under this statute, in civil cases, the defendant must be a citizen of the State and an inhabitant of the District in which the suit is brought, except that when the jurisdiction depends on diverse citizenship the suit may be brought in the District of which the defendant is a resident, or of which the plaintiff is a resident.<sup>3</sup>

You are aware that, where non-residents are

<sup>1</sup> [*Schunk v. Moline, &c. Co.*, 147 U. S. 500.]

<sup>2</sup> [*Eastman v. Sherry*, 37 Fed. Rep. 844.]

<sup>3</sup> [*McCormick Co. v. Walthers*, 134 U. S. 41.]

sued in the courts of the States, their property may be attached and jurisdiction thus be obtained by the court over that property, partly as a means of compelling an appearance in the suit, or, if an appearance should not be put in, as a means of exercising the jurisdiction of the court over that property, and proceeding to a sale of it, in order to satisfy what is the asserted demand. It is not so in the courts of the United States. The defendant must be [a resident] within the district [except in cases where the jurisdiction depends on diverse citizenship], and personal service must be made upon him. It is not sufficient that his property can be attached, either directly or by means of a foreign attachment. This has been settled by a variety of cases, to some of which I will refer you. The case of *Toland v. Sprague*, 12 Peters, 300, is the leading case on the subject. Since the decision of that case, the point has come up in various shapes before the Circuit Courts, and one of the cases is *Day v. The Newark Manufacturing Company*, 1 Blatch. 628; and in another form, the case of *Sayles v. The Northwestern Insurance Co.*, 2 Curtis's C. C. R. 212.

You must bear in mind, however, that although it is a requirement of the law that a defendant [must be sued in the District wherein he resides, except as aforesaid], and personal service made upon him, yet if he voluntarily appears, that waives the objection, and the court may then proceed against him, exactly as if personal service had been made. That was settled in the leading case of *Toland v. Sprague*, to which I have already given you a reference.

[This is still the law. Jurisdiction cannot be waived, but service of process can be. No consent of parties can confer jurisdiction upon the court.<sup>1</sup> Thus a citizen of Massachusetts could not be sued in the Circuit Court for the District of Massachusetts, by a citizen of the same State, — unless a Federal question was at issue, — even though he accepted service of process, and consented to be sued there. But when jurisdiction exists, because a Federal question is involved, or because the plaintiff and defendant are residents of different States, the defendant may waive his personal privilege (as it is called) of being sued in the District where he resides, or (if the case depends solely upon diverse citizenship) either in the District where he resides or in that where the plaintiff resides, and may consent to be sued in any District in any State. And the defendant does waive his privilege to be sued in the District appointed by the statute, if he appears and contests the suit, without objecting to the jurisdiction. This objection cannot be taken for the first time when the case comes up on appeal to the Supreme Court or to the Circuit Court of Appeals.<sup>2</sup>

Although a corporation doing business in a

<sup>1</sup> [The jurisdiction of the Federal Courts is a limited one, depending upon either the existence of a Federal question or diverse citizenship of the parties. Where these elements of jurisdiction are wanting, the court cannot proceed even with the consent of the parties. See *Manafield, Coldwater, & Lake Michigan Ry. v. Swan*, 111 U. S. 379.]

<sup>2</sup> [*St. Louis &c. R. R. Co. v. McBride*, 141 U. S. 127; *McCormick Harvesting Machine Co. v. Walther*, 134 U. S. 41; *Kansas City & T. R. R. Co. v. Interstate Lumber Co.*, 37 Fed. Rep. 3; *Interior Construction & Improvement Co. v. Gibney*, 160 U. S. 217.]

State other than that where it was incorporated, has agreed, in compliance with a statute of the State, that process may be served upon its agent there, it is not thereby compelled to accept service of process in a suit brought in the Circuit Court in that State. The right to be sued in the District of which the corporation is a resident, and in the State wherein it was incorporated, cannot be taken away by any State statute.<sup>1</sup>]

There has been very recently some enlargement made of the authority of the Circuit Courts by an act to which I referred you the other day, passed on the 1st day of June, 1872, in its thirteenth section.

[Subsequently this act was embodied in Rev. Stat. sect. 738, enacted December 1, 1873. Later the Act of March 3, 1875, chap. 137, sect. 8, repeated this provision, but made a slight change in it; and inasmuch as the present act, that of 1887-1888, expressly saved sect. 8 of the Act of March 3, 1875, that section is still the law upon the subject. It runs as follows: "When in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property within the District where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said District, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer,

<sup>1</sup> [*Southern Pacific Co. v. Denton*, 146 U. S. 202.]

or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six successive weeks; and in case such absent defendant shall not appear, plead, answer, or demur, within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said District; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such District.”<sup>1</sup> (Then follows a provision that the matter may be opened, within one year, by any absent defendant who did not receive personal notice.)

It has been held that this section, being saved by the Act of 1887-1888, is not affected by the provisions of that act in regard to the District in which suit must be brought, and consequently that non-resident defendants can still be sued, under this

<sup>1</sup> [18 Stat. 472.]

section, although the suit is brought neither in the district of the plaintiff nor of the defendant.<sup>1</sup> It has also been held that suit may be brought under this section, although there is only one defendant, and he is absent.<sup>2</sup>

The substance of that [section] is, that where real or personal property is within the territorial jurisdiction of the court, and a third person claims some right, either to the property itself, or to a lien on it, or some interest in it, he may have that title adjudicated upon by the Circuit Court within whose territorial jurisdiction the property is, by means of a notice given to the person in the manner here provided, although that person is not even within the District, and cannot be served with what can be called a process of court; because such a notice as is here provided for is not a process of the court, but is merely a means of giving him notice that he may appear if he wishes to. This is an important extension of the authority of the court especially in those States where questions constantly arise in regard to real property; it is more important there than in the Eastern States, where questions of title to real property are comparatively of infrequent occurrence.<sup>3</sup>

In regard to the judges who are to constitute this court; originally they were the judges of the Supreme Court and of the District Court. A Judge

<sup>1</sup> [*Greeley v. Lowe*, 155 U. S. 58.]

<sup>2</sup> [*Dick v. Foraker*, 155 U. S. 404.]

<sup>3</sup> See *Ober v. Gallagher*, 93 U. S. 199. Where part of the property is out of the State, see *Muller v. Dows*, 94 U. S. 444. See also *McBurney v. Carson*, 99 U. S. 567.

of the Circuit Court, in all modern times, has been either the Chief Justice or one of the Associate Justices of the Supreme Court of the United States, holding the Circuit Court by virtue of the authority conferred upon him by Congress for that purpose; and the Judge of the District Court is also empowered to preside over the Circuit Court in the District where his District Court is held, or in other Districts of the same Circuit, on the designation of that Judge of the Supreme Court assigned to that Circuit.<sup>1</sup> There has now been added another class of judges, called Circuit Court Judges.<sup>2</sup> They are judges appointed for each Circuit, the entire United States being divided into nine Circuits, and nine Circuit Court Judges have been appointed under a recent law of Congress, and each of these Circuit Judges has power to hold the Circuit Court alone, just as the Supreme Court Judge or District Judge has power to hold a court alone; or any two of them may sit together; no more than two can sit together, but any two, a Judge of the Supreme Court and a District Judge may sit together, or a Judge of the Supreme Court and a Circuit Judge may sit together, or a Circuit Judge and a District Judge may sit together, and each of them is competent to hold court alone. That, so to speak, is the *personnel* by which these Circuit Courts are constituted throughout the country.<sup>3</sup>

<sup>1</sup> [There is one District Judge for each District, except that in a few cases, a District Judge acts for two Districts in a State.]

<sup>2</sup> [This was done in 1869. By the Act of 1891, an additional Circuit Judge was provided for each Circuit. In four Circuits — namely, the 2d, 7th, 8th, and 9th — there are now three Circuit Judges. In all the others there are two.]

<sup>3</sup> Revised Statutes, Chap. 6, Title XIII.

The next subject of inquiry is, what parts of the judicial power of the United States do these courts exercise, — what is their jurisdiction, in other words. That is distributable into two distinct parts: first, that which arises from the character of the parties, and, second, that which depends upon the subject-matter involved in the suit. I think it proper to premise here, that although this is only a limited jurisdiction, — limited first by the character of the parties, and secondly by the nature of the subject-matter involved in the suit, — still, any party who has a right to come into the Circuit Court of the United States finds a court clothed with entire power to do justice according to law, or according to equity, whichever he appeals to. Although this is a court of limited jurisdiction, the limits of its jurisdiction are limits which affect the persons who may come there, or the subjects which may be brought there; but when a person has a right to come there, or the subject is one which can be brought there under the Constitution and laws of the United States, the court has entire power, as a court of equity or as a court of law, to do justice between the parties. It is not a court of limited jurisdiction in any other sense than that which I have now explained.<sup>1</sup> To what parties, then, by reason of their character, does the jurisdiction of the Circuit Courts extend? . . .

The first thing to be mentioned is, that where the United States are plaintiffs or petitioners, either at law or in equity, the Circuit Court has jurisdiction. That has been still further extended

<sup>1</sup> *Gaines v. Fuentes*, 92 U. S. 10; *Burbank v. Bigelow*, *Ib.* 179.



by an Act of Congress, passed on the 3d of March, 1815, § 4, found in 3 Statutes at Large, 245:—

“That the District Court of the United States shall have cognizance concurrent with the courts and magistrates of the several States, and the Circuit Courts of the United States, of all suits at common law where the United States or any officer thereof, under the authority of any Act of Congress, shall sue, although the debt, claim, or other matter in dispute, shall not amount to one hundred dollars.”

This is a very clumsily drawn section. It seems to assume that the Circuit Courts already had jurisdiction, and that Congress was to confer on the District Court a jurisdiction concurrent with that which the Circuit Courts before had. And in consequence of that, when the Postmaster-General brought an action upon a bond, given to him in his official capacity, it was insisted that that act did not confer any jurisdiction on the Circuit Court, but merely assumed that they already had jurisdiction, and that Congress had made a mistake in that particular. Well, as might naturally be supposed, the Supreme Court overruled this objection, in a case reported in 12 Wheaton, 136,<sup>1</sup> where they held, that, although Congress could not declare what the law was in the past, they could show what they expected and intended it to be in the future, although they did not expressly say so; that “concurrent jurisdiction with the District Court” meant that the Circuit Court should have the same jurisdiction, otherwise it could not be concurrent; and that the Postmaster-General, as an officer of the

<sup>1</sup> *Postmaster-General v. Early.*

United States, might bring the suit. This, as you perceive, is some extension of the Judiciary Act; but I believe no one questions that where an officer of the United States, in his official capacity, brings a suit in behalf of the United States, the provision of the Constitution which requires the United States to be a party is sufficiently satisfied.<sup>1</sup>

The next clause to be noticed is, that this act [the Judiciary Act of 1789] says, "where an alien is a party."<sup>2</sup> Well, the Constitution does not say so. The Constitution says that the judicial power shall extend to suits between citizens of a State and citizens or subjects of a foreign state. It is not enough, therefore, to satisfy the Constitution, that an alien is a party, — a citizen must be the other party; and accordingly, it was held in the case of *Hodgson v. Bowerbank*, 5 Cranch, 303, where the averment merely was that the plaintiff was an alien, not saying anything concerning the character of the defendant, that the suit could not be maintained. Not only must an alien be a party, but a citizen must be the other party.<sup>3</sup>

<sup>1</sup> These ambiguities are now removed by the Revised Statutes. § 563, sub-division 4, gives the District Courts jurisdiction "of all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue." See the case of *Lewis, Trustee, v. The United States*, 92 U. S. 618.

<sup>2</sup> [In the present act (that of 1887-1888) the language is "a controversy between citizens of a State and foreign States, citizens or subjects, in which the matter in dispute," etc., following the Constitution.]

<sup>3</sup> Judge Curtis was speaking here of the eleventh section of the Judiciary Act of 1789. The same phraseology is repeated in § 629 of the Revised Statutes, and with the same ambiguity. The meaning is, that, where an alien is a party, a citizen of some State must be the other party.

There are several more recent cases, in which the same doctrine was affirmed; one is in 16 Howard, 104,<sup>1</sup> to which it would not have been necessary for me to refer you, were it not proper to call your attention to what is a plain mistake, and which might perhaps mislead. It is at the very close of the opinion. "The Constitution," the judge says, "which is the superior law, defines the jurisdiction to be 'between citizens of a State, and foreign States, citizens, or subjects.'" Then follows this: "And although it has been decided (*Mason v. The Blaireau*, 2 Cranch, 264) that the courts of the United States will entertain jurisdiction where all the parties are aliens, if none of them object, yet it does not appear in this case that the defendant is an alien." The judge overlooked the fact, the decisive fact, that the case of *Mason v. The Blaireau* was a suit in admiralty to recover salvage compensation, not depending at all upon the character of the parties, and that the doubt which arose in that case in regard to entertaining the suit, because the parties were aliens, was a doubt which has been from time to time expressed in courts of admiralty, — whether the admiralty court of a nation could entertain jurisdiction where all the parties in interest were subjects of another State or nation, as a matter of comity and propriety, but not at all as a question of jurisdiction. I mention this, because otherwise you might from that case take the impression that the Supreme Court had decided that, where the jurisdiction depended upon the character of the parties, they could enter-

<sup>1</sup> *Piquignot v. Pennsylvania Railroad Company*.

tain a suit with aliens on both sides, if no objection was made, which, I take it, has never been decided, and probably never will be.<sup>1</sup>

The next clause in this section material to be noticed is, that the court has jurisdiction over suits between a citizen of the State where the suit is brought, and a citizen of another State.<sup>2</sup> Of course, it is to be read in the plural as well as in the singular; that is, between a citizen or citizens of a State where the suit is brought, and a citizen or citizens of another State. But nevertheless, under this eleventh section of the Judiciary Act, it is necessary that each one of the parties plaintiff shall be competent to sue each one of the parties defendant. A citizen of Massachusetts is competent to sue, in the Circuit Court of Massachusetts or New York, a citizen of New York. He is not competent to sue a citizen of New York and a citizen of Massachusetts, because of the rule I have already stated. Every plaintiff, supposing him to be the sole plaintiff, must be competent to sue every defendant, supposing him to be the sole defendant; and if any one of the plaintiffs is not competent to sue a defendant, or if any one of the defendants could not be sued under this jurisdiction by those plaintiffs, then the suit under this eleventh section cannot be maintained. You will find this laid down, and well explained, in the case of *Coal Company v. Blatchford*, 11 Wallace, 172.<sup>3</sup> The Constitution is much broader than this.

<sup>1</sup> The law is settled otherwise. 4 Cranch, 46; 2 Peters, 136, 556.

<sup>2</sup> [The language of the present Act is, "a controversy between citizens of different States, in which the matter in dispute," etc.]

<sup>3</sup> See the case of *The Sewing Machine Companies*, 18 Wallace, 553. [See also *Blake v. McKim*, 103 U. S. 336; *Removal Cases*, 100

The Constitution says: "The judicial power shall extend to all cases" (describing now cases depending upon the subject-matter) "and controversies between two or more States, between a State and citizens of another State, and between citizens of different States." All the Constitution demands is, that the parties to the suit shall be citizens of different States; that on one side they shall be citizens of one State, and on the other side they shall be citizens of some other State; but this eleventh section requires that on one side they shall be citizens of the State in which the suit is brought, which is an additional requirement, and, on the other side, citizens of another State.<sup>1</sup>

It was contended, formerly, that there was an absolute duty incumbent upon Congress, to which the Judiciary Act gave effect, to vest the whole of this judicial authority in some court or courts of the United States. It is, however, now perfectly well settled, that, whether this be a duty incumbent upon Congress or not, it is a duty of imperfect application; and one which the courts of the United States cannot enforce. Power is given to Congress "to create such inferior courts" (inferior to the Supreme Court) "as from time to time they shall ordain and establish." Of course, when they create a court, they confer upon it its jurisdiction,

U. S. 457; *Bensinger Self Adding Cash Register Co. v. National Cash Register Co.*, 42 Fed. Rep. 81; *Smith v. Lyon*, 133 U. S. 315.]

<sup>1</sup> This requirement is repeated in § 629 of the Revised Statutes. [A State is not a citizen. Therefore a suit between a State and citizens of another State is not a controversy between citizens of different States; and the Circuit Court has no jurisdiction over it unless it involves a Federal question. *Postal Telegraph Cable Co. v. Alabama*, 155 U. S. 482.]

and, unless they confer the whole jurisdiction which the Constitution enables them to do, those courts must have a lesser jurisdiction; and therefore the Supreme Court have decided, in the case of *Cary v. Curtis*, 3 Howard, 245, that all the courts of the United States can look to is, not what Congress ought to have done, but what it has done. If it has conferred jurisdiction, they can exercise it. If it has not, they cannot exercise it. And the same law had been in substance previously laid down in *Kendall v. United States*, 12 Peters, 616.

Congress has, however, by a more recent act, passed on the 28th of February, 1839, found in 5 Statutes at Large, 321, conferred a broader jurisdiction on the Circuit Courts, having regard to the character of the parties. It is the first section of that act: —

“That when there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties, not regularly served with process, nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district as aforesaid, shall not constitute matter of abatement or objection to the suit.”<sup>1</sup>

<sup>1</sup> [This was re-enacted in § 737 of the Revised Statutes, the language of which is given in the text. It might be argued that this

That statute has been twice before the Supreme Court, and in the last case in which it came there, — *Jones v. Andrews*, 10 Wallace, 327, — they held, that although this language does not point directly to anything except a failure to serve notice, nevertheless it was the intention of Congress to make it co-extensive with the terms of the Constitution, and that parties who were not citizens of the State where the suit was brought might nevertheless, if they chose, voluntarily come in, and have their rights adjudicated under this section. That, you perceive, is an extension of the eleventh section of the Judiciary Act to cases which that eleventh section would not have included; so that now, if a suit should be brought by a citizen of Massachusetts against two citizens of two different States, and service made on one of them, because he was found there, and no service made on the other, but the other chose voluntarily to come in, although the court could not entertain jurisdiction under that eleventh section, they can entertain it under the third section of this Act of 1839. The same act

section was repealed by the Act of 1887–1888, but the contrary seems to have been taken for granted in the following cases where the section was applied: *Gross v. Geo. W. Scott M'fg Co.*, 48 Fed. Rep. 35; *Collins M'fg Co. v. Ferguson*, 54 Fed. Rep. 721. This section is re-enforced by Equity Rule No. 47, as follows: "In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such case the decree shall be without prejudice to the rights of the absent parties"]

had come before the court previously, in a case reported in 17 Howard, 141,<sup>1</sup> not in this aspect of it, as an extension of the eleventh section of the Judiciary Act to other parties, but in reference to other points, and it is an important case for you to look at. The court there held that they can make no decree affecting the interest of any absent party, although that absent party might have been a competent party if he could have been served, or might be a competent party if he chose to come in voluntarily; but in the absence of a party whose interests will be affected by the decree, they cannot make any decree affecting his interests, and, if they can make no decree at all without affecting his interests, then they can make no decree.

There are a great many cases in equity where it is proper to make persons parties, but where they are, after all, merely formal parties; no decree is sought against them. It is proper to make them parties, because, from their relation to the subject-matter of the suit, they may be supposed to have knowledge and to be capable of assisting in the elucidation of the subject of the suit, although they are not necessary parties; and the courts have held that they will take jurisdiction in the absence of such merely formal parties.<sup>2</sup>

The inquiry arises, under this clause of the eleventh section, What is a citizen? Who is a citizen of Massachusetts, or of any other State? And it is well settled that a citizen, judicially, is

<sup>1</sup> *Shields v. Barrow*.

<sup>2</sup> [This paragraph has been transferred from the succeeding lecture to this place.]



one who is a citizen of the United States, either native or naturalized, and domiciled in a particular State. Any person who is a native or a naturalized citizen of the United States, and who has a domicile in Massachusetts, is a citizen of Massachusetts, and so of the other States. This provision, however, it has been held, does not include those citizens of the United States who are domiciled in the District of Columbia, or in the Territories. That was decided in the case of *New Orleans v. Winter*, 1 Wheaton, 91. It is citizens of the States only whose rights are provided for under the Constitution and the Acts of Congress giving jurisdiction to the Circuit Courts.

It must very often happen, that suits are brought by persons who act in a representative capacity, as executors, or administrators, or guardians, or trustees. It is settled that evidence that they act in a representative capacity, and that those whom they represent would not be competent of themselves to sue, does not affect the jurisdiction of the court. If an executor is a citizen of the State of Massachusetts, although every person whom he represents is a citizen of some other State, he may sue as a citizen of Massachusetts. That was held quite recently. It had been held before, but I will give you the last decision on the subject: 11 Wallace, 172.<sup>1</sup> On the other hand, if a person is

<sup>1</sup> *Coal Company v. Blatchford*. See 13 Wallace, 66, where it was held that an administrator, being at the time of his appointment a citizen of the same State as his decedent and the defendant, and afterwards removing into another State, may sue as administrator in a Federal court. [See also *Lamar v. Micou*, 112 U. S. 452.]

not acting strictly in a representative capacity, as an executor, administrator, guardian, or trustee, but is what is called a mere conduit, through which the money or property sued for is to pass to a third person, that third person may bring the suit, and, if he is competent as a citizen to bring it, it is of no consequence if this other person, to whom the promise was in form made, would not be competent to sue. As, for instance, there are a great number of cases in which public officers are required to take bonds for the use of a particular party in interest; sometimes a sheriff, sometimes judges of probate, etc., in various States. There are a great many instances of that kind, where bonds are taken by a public officer, but where the public officer has no interest whatever in the matter, but the private party for whose benefit the bond is taken is incapable, under the local law, of bringing a suit. Now, wherever a private party is capable of bringing a suit by force of the local law, it is treated as his right, and the other party to whom the promise is made is a mere conduit, through whom this right passes to the beneficiary.<sup>1</sup>

I would mention also, in this connection, that, when the jurisdiction has once attached, it is not defeated by any change, either in the domicile of the party who has brought the suit, or by his decease and the coming in of an executor or administrator

<sup>1</sup> The Circuit Court has jurisdiction, under the eleventh section of the Judiciary Act, of a suit in the name of the Governor of a State, on a sheriff's bond to the Governor, if the parties beneficially interested in the suit be citizens of another State, and competent to sue the defendant. *McNutt v. Bland*, 2 Howard, 9. See also *Broune v. Strobe*, 5 Cranch, 303.

who would not have been capable of suing. As, for instance, a citizen of Massachusetts brings a suit in the Circuit Court of Massachusetts against a citizen of Rhode Island, and after the suit is brought, while it is pending in court, the citizen of Massachusetts moves to Rhode Island; that does not defeat the jurisdiction. A court having competent jurisdiction over the suit does not lose it by a change in the citizenship of the party. Instead of that, suppose the citizen of Massachusetts who brings the suit dies, and a citizen of Rhode Island is his executor or administrator; still, it is held that the suit is prosecuted by him under the jurisdiction which the court originally obtained, and which is not defeated by this change which has taken place by the death of the party. These two points have been settled by the case of *Morgan v. Morgan*, 2 Wheaton, 290, and the case of *Clarke v. Mathewson*, 12 Peters, 164; and these principles are just as applicable to any other change of parties as to that which occurs in the case of removal or death. They are applicable where, owing to a change of interest or from other circumstances, parties have come in to succeed to the property which was brought under the jurisdiction of the court by a proper proceeding originally, and no change will defeat the jurisdiction. This was decided in the case of *Dunn v. Clarke*, 8 Peters, 1.

There are two other cases which show that other changes than those which I have mentioned will not defeat the jurisdiction when once it is possessed; the cases of *Freeman v. Howe*, 24 Howard, 450, and *Huff v. Hutchinson*, 14 Howard, 586.

The case of *Freeman v. Howe* is one which pushes the jurisdiction, perhaps not too far, but to a great extent, where the court held that, when a marshal had attached property under a process from the Circuit Court, an action of replevin would not lie to take the property out of the hands of the marshal, because it was in the custody of the law under that court. The difficulty which was suggested was, "There can be no litigation between a marshal who is a citizen of Massachusetts, and the claimant of this property, the plaintiff in replevin, who is also a citizen of Massachusetts," to which the court responded: "Yes, there can be. A court having jurisdiction, and having extended its jurisdiction over this property, these parties may try the title as the court shall direct, under a petition, or by any other proper form of proceeding." And therefore the jurisdiction of the State court by replevin was denied. They have, however, since held, — and I may mention it in this connection, — that although the property cannot be taken out of the hands of the marshal by a writ of replevin, an action of trespass or trover will lie against him for the tort.

The citizenship necessary to give jurisdiction to the court must be averred on the record; and a failure to make this averment is fatal, at any stage of the case, to the jurisdiction.<sup>1</sup> That has fre-

<sup>1</sup> [When non-residents are improperly joined as defendants with residents, they only, and not the resident defendants, can object to the jurisdiction. *Smith v. Atchison &c. R. R. Co.*, 64 Fed. Rep. 1. But see an intimation to the contrary in *Interior Construction &c. Co. v. Gibney*, 160 U. S. 217.]

quently been decided ; but I will refer you only to the leading case of *Montalet v. Murray*, 4 Cranch, 46.<sup>1</sup>

The usual form in which the averment is made in ordinary practice in an action at law is to say that A. B., a citizen of the State of Massachusetts, is summoned to answer to C. D., a citizen of the State of Rhode Island. That is the usual mode of making the averment on the record, and that, or something equivalent to it, is necessary in all cases. In a suit in equity, the usual mode is derived from the form of the commencement of such a bill prescribed by the rules of the Supreme Court for the practice of the Circuit Courts. That form is this:—

A. B., a citizen of the State of Massachusetts, brings this his bill in equity against C. D., a citizen of the State of Rhode Island. The averment as to the citizenship is usually inserted in that form, at the commencement of the bill, and that is the proper mode of doing it. Nevertheless, there is no particular form required by law in order to found the jurisdiction. If it appears in any way on the face of the record, sufficiently and satisfactorily, that the parties on one side, by reason of their citizenship, are capable of suing the parties on the other side, by reason of their citizenship, that is sufficient. You will find this to have been held in the case of *Jones v. Andrews*, 10 Wallace, 327.

<sup>1</sup> ["The Courts of the United States possess no powers except such as the Constitution and Acts of Congress concur in conferring upon them, and the legal presumption is that every cause is without their jurisdiction, until and unless the contrary affirmatively appears." *United States v. Southern Pacific Ry. Co.*, 49 Fed. Rep. 297. See also *Mexican Central Railway Co. v. Pinkney*, 149 U. S. 194.]

Another important thing to be attended to in this connection is, that, if the record contains the proper averments of citizenship to found the jurisdiction, these averments can be traversed only by a plea to the jurisdiction of the court, a plea in abatement; a preliminary plea, going to the jurisdiction of the court. This was decided in the case of *Wickliffe v. Owings*, 17 Howard, 47. The reason of this is, that, when the necessary citizenship is averred upon the record, and the defendant, instead of pleading to the jurisdiction, pleads to the merits, he admits the jurisdiction of the court, and afterwards is in no condition to deny it. And this is an important consideration; because, where the necessary citizenship is averred upon the record, and the defendant traverses a matter of fact, — traverses the fact that he himself is a citizen of a different State from the plaintiff, or that the plaintiff is a citizen of a different State from himself, — if he fails, and the judgment is against him, he loses his case. He is not merely ordered to answer over, but he is ordered to pay the debt or damages. This is a matter of common law, — it does not rest at all in the peculiar jurisdiction of the courts of the United States, but is perfectly well settled. You will find it set down in 1st Chitty's Pleadings, 464, 465. There is also the case of *McCartee v. Chambers*, 6 Wendell, 649. It is well-settled law that, where a defendant pleads a dilatory plea, and by it traverses a matter of fact, and fails on his traverse, he fails altogether, and the judgment is rendered against him. That being so, you perceive that it is a very delicate matter for a defendant to

take his chance of denying the citizenship alleged on the record; because, if he prevails, he only defeats that suit; but if he fails, he fails altogether.<sup>1</sup>

I will now proceed to the further consideration of the parties over whom the courts of the United States, under this eleventh section, have jurisdiction. One of the most important and difficult questions on the subject of parties, which has been almost constantly before the Supreme Court of the United States during the last quarter of a century, is the question of jurisdiction over corporations. This eleventh section deals only with citizens, and it has been from first to last admitted that corporations are not citizens. They are political beings, created by the law, and cannot sustain the character of citizens. Still, owing to the vast number of corporations which have been created by the different States, for almost all imaginable purposes, and, amongst others, for wielding great amounts of capital, transacting vast amounts of business, by the ownership of vessels, railroads, banks, insurance companies, almost all the departments of business which produce litigation, it became very early apparent that, unless the courts of the United States could in some way hold jurisdiction over this class of persons, they would answer extremely ill some of the purposes which the Constitution had in view when it created the judicial power of the United States.

<sup>1</sup> Cases of citizenship not sufficiently averred, *Godfrey v. Terry*, 97 U. S. 171; *Robertson v. Cease*, Ibid. 646. [As to what constitutes citizenship, or change of citizenship, see *Allen v. Southern California Ry. Co.*, 70 Fed. Rep. 725.]

I suppose it may fairly be said, that neither the framers of the Constitution nor the framers of the Judiciary Act had corporations in view. They were so few at that time, so entirely unimportant, that it is probable they were passed over without any notice or consideration. I had the curiosity to-day to look into the first volume of the Special Laws of Massachusetts, which, at the time of the formation of the Constitution, was perhaps as wealthy a State, in proportion to its population, and as likely to have created business corporations, as any other; and I find that between the time when the Constitution of Massachusetts was formed, and the time when the Constitution of the United States was adopted and this Judiciary Act passed, the State of Massachusetts created but one private corporation, and that was the Marine Society of the town of Salem. There was no bank, no insurance company, of course no railroad corporation or corporation owning steamers, or any of those things which at this day are of such magnitude.

When this subject first came before the Supreme Court, they took a pretty rigid view of it. They considered that a corporation created by the law of a particular State was like a partnership; it had some privileges which partnerships had not, but in substance they considered it to be a partnership, and they went on from that view to this inference: that if all the members of a corporation were citizens of one State, and the party on the other side was a citizen of a different State, by alleging that fact jurisdiction could be obtained. This was held in the case of *The Bank of the United States v.*



*Deveaux*, 5 Cranch, 61; and in the case of *The Hope Insurance Company v. Boardman*, in the same book, page 57. The two cases were considered together; and it was repeated afterwards, so late as the case of *The Bank of Vicksburg v. Slocomb*, 14 Peters, 60. Now, you will readily see that there were very few cases of large corporations where all the members were citizens of one State, and that, if it were necessary to aver that fact on the record, the jurisdiction of the courts of the United States would have a very narrow application to corporations. I suppose there is no considerable corporation created by either of the States in which there are not one or more persons who are stockholders outside of the State.

Well, this was a difficulty which had been encountered before in the history of the law. If you should take the trouble to look into Sir Henry Sumner Maine's admirable book on the History of Ancient Law, you will find mentioned there three cases of an analogous character. The first arose under the Roman law, where it was necessary, in order to give their important courts jurisdiction, to allege that the plaintiff was a Roman citizen; but after the commerce of the city and the empire became so extended, and such a number of foreigners had important rights and interests to be vindicated in the courts, they introduced what they called "a fiction" (*fictio*), which meant that anybody who had a proper cause of complaint might allege that he was a Roman citizen, and that allegation should not be denied. In other words, they introduced, by their own authority, a rule

that a falsehood might be stated on the record, and that the other party could not allege the truth. Well, there were two instances in England like this. One was where the Court of Exchequer obtained a great amount of jurisdiction by an allegation in the declaration that the plaintiff was a debtor to the king, and could not pay his debt unless the court would help him to recover what he demanded in that action; and that allegation was held not to be traversable. A similar allegation was permitted by the Court of King's Bench, in order to obtain jurisdiction as against the Common Pleas; that the plaintiff was in the custody of the Marshal of the Court of King's Bench, and consequently could not go into any other court and prosecute his rights. That was held not to be traversable.

Now, I want to bring your attention to the case of *The Ohio and Mississippi Railroad Company v. Wheeler*, 1 Black, 286, and you will see how this decision corresponds with the progress made by the Roman and English courts on similar subjects. Some parts of the marginal note express clearly what I wish to bring to your attention: "A corporation exists only in contemplation of law and by force of law, and can have no legal existence beyond the bounds of the sovereignty by which it is created, and it must dwell in the place of its creation." All that had been previously settled, and is unquestioned law. "A corporation is not a citizen within the meaning of the Constitution, and cannot maintain a suit in the courts of the United States against a citizen of a different State from that by which it was created, unless the persons

who comprise the corporate body are all citizens of that State." That is the old law. "In such cases, they may sue by their corporate name, averring the citizenship of all the members, and such a suit would be regarded as the joint suit of individual persons, united together in a corporate body, and acting under the authority conferred upon them for the more convenient transaction of business, and consequently entitled to maintain a suit in the courts of the United States against the citizen of any State." That is the old law also.

"Where a corporation is created by the laws of a State" (we now advance to some new doctrine), "the *legal presumption* is that its members are citizens of the State in which alone the corporate body has a legal existence." That is laid down as a legal presumption.

"A suit by or against a corporation in its corporate name *may be presumed* to be a suit by or against citizens of the State which created the corporate body, and *no averment* or denial to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States." There is the Roman "fiction." The court first decides the law, presumes all the members are citizens of the State which created the corporation, and then says you shall not traverse that presumption; and that is the law now. Under it, the courts of the United States constantly entertain suits by or against corporations.<sup>1</sup> It has been

<sup>1</sup> *Muller v. Dows*, 94 U. S. 444. [In many of the States there are statutes requiring foreign corporations to file a sworn statement with the Secretary of State, concerning the amount of their capital stock,

so frequently settled, that there is not the slightest reason to suppose that it will ever be departed from by the court. It has been repeated over and over again in subsequent decisions; and the Supreme Court seem entirely satisfied that it is the right ground to stand upon; and, as I am now going to state to you, they have applied it in some cases which go beyond, much beyond, these decisions to which I have referred. So that when a suit is to be brought in a court of the United States by or against a corporation, by reason of the character of the parties, you have only to say that this corporation (after naming it correctly) was created by a law of the State of Massachusetts, and has its principal place of business in that State; and that is exactly the same in its consequences as if you could allege, and did allege, that the corporation was a citizen of that State. According to the present decisions, it is not necessary you should say that the members of that corporation are citizens of Massachusetts. They have passed beyond that. You have only to say that the corporation was created by a law of the State of Massachusetts, and has its principal place of business in that State; and that makes it, for the purposes of jurisdiction, the same as if it were a citizen of that State.<sup>1</sup>

etc., as a condition of their bringing suit in that State. Such statutes cannot operate to prevent corporations which fail to comply with them from bringing suits in the Federal courts of the State. *Barling v. Bank of British North America*, 50 Fed. Rep. 260.]

<sup>1</sup> [In a very recent case (*St. Louis & San Francisco Ry. v. James*, 161 U. S. 545), the court were asked to go one step further, and to hold that "if a corporation of one State . . . is authorized by the law of another State to do business therein, and to be endowed, for

Still, there are cases remaining to be decided on this very difficult subject; because corporations — particularly railroad and canal corporations, whose works extend from one State into another — were frequently either licensed by that other State to act within its limits, or they were there incorporated; and in many instances the two were declared to constitute but one corporation, although created by two States. The first case of this kind before the court which gave rise to any considerable difficulty was that of *The Baltimore and Ohio Railroad Corporation v. Harris*, 12 Wallace, 65. That corporation was created by the State of Maryland; but it was licensed by Congress to act in the District of Columbia, and by the legislature of Virginia to act in that State; and the question was whether it could be treated as if it were the creation of Maryland law only. In that case, the Supreme Court held that it was a Maryland corporation; that the authority to act in another State, or the license to act in another State, did not affect the character of the corporation so that it was disabled from alleging itself to be a Maryland corporation; and that from that allegation the presumption arose that its members were citizens of the State of Maryland, and that it was competent to sue as if it were itself a citizen of the State of Maryland.

Then, however, another question arose, which

local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the *second* State, in such a sense as to confer jurisdiction on the Federal courts at the suit of a citizen of the State of its original creation." This step the court refused to take. See the opinion, which is long and instructive.]

related to the second kind of occurrences to which I have adverted, — where a railroad corporation extended from one State into another, and had an act of incorporation in each of them, and was declared by each of those acts of incorporation to be the same political body, — that is, to be a citizen of each of the two States. Well, in the case in 13 Wallace, 270,<sup>1</sup> and more particularly on page 283, it was held that two States could not create one corporation; that each State may create a political being, but that political being can only exist within the limits of that State, and so far as the law of that State which created it extends; that it is of no consequence, as respects jurisdiction, that some other State has also made a corporation by the same name, or even that the two States have declared that it shall constitute one corporation; that they are two corporations, and if the corporation is competent to sue and be sued in the State where it does sue or is sued, — competent in reference to the other party to the suit, — then it is of no consequence that some other State has created a corporation by the same name, or even called it the same corporation.<sup>2</sup>

I think I have stated now all that is needful to enable you to understand this complicated subject of jurisdiction over corporations; and perhaps I

<sup>1</sup> *Railway Company v. Whitton's Adm'rs.*

<sup>2</sup> A corporation created by the laws of Iowa, although consolidated with another of the same name in Missouri, under the authority of a statute of each State, is nevertheless in Iowa a corporation existing there under the laws of that State alone. *Muller v. Dows*, 94 U. S. 444. [See also *Nashua & Lowell R. R. v. Boston & Lowell R. R.*, 136 U. S. 356; *St. Louis & San Francisco Ry. v. James*, 161 U. S. 545.]

might properly repeat simply, that, if you have occasion to bring a suit by or against a corporation, and the party on the other side is competent either to sue or be sued, provided the corporation were a citizen of the State which created it, you may treat the corporation as a citizen of the State which created it, and on the record you have only to aver that it was created by the law of a particular State, and has its principal place of business therein. Then it will stand in all respects as if it were a citizen, though we all know that it is not a citizen, and cannot be.<sup>1</sup>

[A difficult question as to the "residence" and "inhabitaney" of corporations arose under the Act of 1887-1888. Under that act, as we have seen already, when the suit is founded upon diverse citizenship, it may be brought in that District where the plaintiff or where the defendant resides; but when the ground of jurisdiction is anything except diverse citizenship, it must be brought in the District of which the defendant is an inhabitant. Now, as Judge Curtis has shown, it is settled that a corporation is a citizen of that State only where it is incorporated; but may it not be an inhabitant of, or a resident in, a different State or District? An

<sup>1</sup> A corporation created in Nebraska issued its bonds and secured them by a mortgage. Holders of some of the bonds applied to the trustee of the mortgage to foreclose it. He refused. They then filed a bill in the Circuit Court against the trustee, the corporation, and others of the bondholders, all citizens of Nebraska, the plaintiffs being citizens of another State. Held, that the court had jurisdiction, notwithstanding some of the defendants were joined solely because they refused to unite with the plaintiffs in bringing the suit. *Hotel Company v. Wade*, 97 U. S. 13.

example would be found in the case of a railroad company which was incorporated in Massachusetts, but which has a line in Vermont also, and agents there for the transaction of business. Does it reside in, or is it an inhabitant of the District of Vermont? The case can be put still stronger, for in many States foreign corporations (that is, corporations of other States) doing business there, are required to have an agent in the State upon whom process can be served. In such cases, is the foreign corporation a resident in, or inhabitant of the District in that State, or in that part of the State, where it does business and has such an agent? Under the Acts of 1789 and of 1875, this question did not arise, for, under those acts, a defendant might be sued in any District where he could be "found," so that process could be served upon him.<sup>1</sup> But in the Act of 1887-1888 this "found" clause did not occur. There were three decisions<sup>2</sup> in which the Supreme Court had discussed what is meant by "citizen," "resident," "inhabitant," and, reasoning from these decisions, the Circuit Courts came to opposite conclusions upon the subject, some holding that a corporation could,<sup>3</sup> and some that it could not<sup>4</sup> be a resident in or inhabitant of a State other than that where it was incorporated. When the

<sup>1</sup> [*United States v. American Bell Telephone Co.*, 29 Fed. Rep. 17, 35.]

<sup>2</sup> [*Insurance Company v. Francis*, 11 Wall. 210; *Ex parte Schollenberger*, 96 U. S. 369, 377; *Railroad Company v. Koontz*, 104 U. S. 5.]

<sup>3</sup> [As in *Consolidated Store Service Co. v. Lamson Consolidated Store Service Co.*, 41 Fed. Rep. 833.]

<sup>4</sup> [As in *National Typographic Co. v. New York Typographic Co.*, 44 Fed. Rep. 711.]



question came before the Supreme Court they took the latter view. They held that resident and inhabitant are equivalent expressions, and that a corporation cannot reside in or be an inhabitant of any State except that in which it was created.<sup>1</sup>

And, further, it is held that suit, in such cases, cannot be brought in any District, except that in which the defendant has its headquarters, although it may transact business and have agents in other Districts in the same State.<sup>2</sup>

But of course a corporation, like an individual, might consent to be sued in any State or District, provided that the requisite diversity of citizenship existed, or that a Federal question was involved. It has been held, however, that an alien corporation may be sued by a citizen of the United States in any District in which valid service can be made upon the defendant. This was chiefly upon the ground that the words "any person," in the sentence "no civil suit shall be brought before either of said courts against any person . . . in any other District than that whereof he is an inhabitant," refer only to inhabitants of the United States.<sup>3</sup>

Another point in regard to the jurisdiction of the Federal courts over corporations should be stated

<sup>1</sup> [*Shaw v. Quincy Mining Co.*, 145 U. S. 444. Mr. Justice Harlan dissented. Shortly before he had stated a different view in *United States v. Southern Pacific Ry. Co.*, 49 Fed. Rep. 297.]

<sup>2</sup> [*Galveston &c. Ry. v. Gonzales*, 151 U. S. 496. (In this case there is a strong dissenting opinion.) A bill is demurrable which sets out that the defendant is a resident of Virginia, without naming the District, since there are two Districts in Virginia: *Harvey v. Richmond &c. R. R. Co.*, 64 Fed. Rep. 19.]

<sup>3</sup> [*In re Hohorst*, 150 U. S. 653.]

here. When a Federal court has once acquired jurisdiction over a corporation it will administer the relief asked for by the plaintiff not only in the State or District where the corporation resides, *i. e.*, was incorporated, but also in any other State where its property is situated. For example, when there is a suit against a railroad to foreclose a mortgage given by it, and the mortgage covers property of the railroad in several States, the court in which the suit was brought will exercise jurisdiction, so far as the mortgage is concerned, in every State where the mortgaged property is situated. If the rule were otherwise, the mortgagee would be put to the trouble and expense of bringing a separate suit in each of the States where the mortgaged property lay.<sup>1</sup>

The next section of the statute, numbered [9] above, runs as follows: "Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other *chose in action* in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

The purpose of this section is to prevent the owner of a *chose in action* who cannot sue upon it in a Federal court, because there is no diverse

<sup>1</sup> [*Muller v. Dows*, 94 U. S. 444, 449. The limits of the rule are stated in *Mercantile Trust Co. v. Kanawha &c. Ry. Co.*, 39 Fed. Rep. 337.]

citizenship between him and the defendant, from assigning it, colorably perhaps, to a citizen of a State different from his own, so that the Federal Court may have jurisdiction of the suit upon it.

The section is very clumsily worded, and its intent is much more clearly stated in the following paraphrase:<sup>1</sup> "The Circuit Court shall have no jurisdiction over suits for the recovery of the contents of promissory notes or other *choses in action* brought in favor of assignees or transferees except over, *first*, suits upon foreign bills of exchange; *second*, suits that might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made; *third*, suits upon *choses in action* payable to bearer, and made by a corporation."

The effect of this section is, therefore, to prevent the assignee of any *chose in action* from suing upon it in a Federal court, unless his assignor<sup>2</sup> could have brought suit there, — except in the case of foreign bills of exchange, and of promissory notes issued by corporations, and made payable to bearer. This second exception refers of course to stocks and bonds emitted by corporations, and it has been held in reference to these that it is not sufficient that they should be made payable to a given person or to his order; that is not equivalent to being made payable to bearer.<sup>3</sup> But a note made

<sup>1</sup> [By Judge Billings in *Newgass v. City of New Orleans*, 33 Fed. Rep. 196.]

<sup>2</sup> [As to who is an assignor, see *Holmes v. Goldsmith*, 147 U. S. 150.]

<sup>3</sup> [*Rollins v. Chaffee County*, 34 Fed. Rep. 91.]

by a corporation payable to itself and indorsed in blank is a note payable to bearer.<sup>1</sup>

In the Act of 1875, which, as I have said, was intended to widen the jurisdiction of the Circuit Courts, all promissory notes and bills of exchange, foreign or domestic, were brought within the exceptions to this clause, so that the assignee of such a promissory note or bill of exchange could sue upon it in the Federal Court, although his assignor could not have done so. On the other hand, in the Act of 1789, the corresponding section was more restricted than it is in the present act, for, in the Act of 1789, the only exception was of "foreign bills of exchange."

It is important to remember that the section embraces only *choses in action*. All other rights of suit may be assigned, and the assignee may sue upon them in the Federal Courts without regard to the citizenship of his assignor.<sup>2</sup> But the phrase *chose in action* is very inclusive. It "includes the infinite variety of contracts, covenants, and promises which confer on one party a right to recover a personal chattel or a sum of money from another by action."<sup>3</sup> But the term does not embrace "mere naked rights of action founded on some wrongful act, some neglect of duty to which the law attaches

<sup>1</sup> [*Barling v. Bank of British North America*, 50 Fed. Rep. 260.]

<sup>2</sup> [Nor is jurisdiction defeated by the fact that the assignment was made for the purpose of obtaining jurisdiction,—provided that the assignment was an absolute one. *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U. S. 327.]

<sup>3</sup> [*Sheldon v. Sill*, 8 How. 441, 449. See also *New Orleans v. Benjamin*, 153 U. S. 411, 433.]

damages.”<sup>1</sup> Thus the assignee of a claim for damages for entering upon lands and carrying away timber can bring suit, if there be diversity of citizenship between him and the defendant, without regard to the citizenship of his assignor.<sup>2</sup>]

Nor does it [the clause in question] apply to an action of replevin to recover the note itself, but only to an action to recover its contents, — that being the sense of these words of the act: “the contents of any promissory note or other *chose in action*.” The Supreme Court say that these words limit the restriction to an action to recover “the contents” of a note, and not to recover possession of the note itself. You will find this laid down in the case of *Sheldon v. Sill*, 8 Howard, 441, and in the later case of *Deshler v. Dodge*, 16 Howard, 622; and the same distinction is made between suits to recover a debt secured by a mortgage, and suits to recover the property mortgaged. If a suit is brought by an assignee to recover a debt secured by a mortgage, the Circuit Court has not jurisdiction unless the assignor could have sued in that court. But if a suit is brought by an assignee to recover the land itself, then the Circuit Court has jurisdiction, provided the assignee has the necessary citizenship; and it is immaterial whether the assignor could sue or not. And this arises also out of the same language to which I have referred; namely, “the contents of a promissory note or other *choses in action*.” The limitation applies only to *choses in action*, and not to property, however it may be connected with them.

<sup>1</sup> [*Bushnell v. Kennedy*, 9 Wall. 387.]

<sup>2</sup> [*Ambler v. Eppinger*, 137 U. S. 480.]

In this connection, it may be proper to state that the burden of proof at the trial is upon the plaintiff to show that the instrument was one on which the assignor could have sued. That, you perceive, differs from what I have already stated in respect to the allegation of citizenship. When the proper citizenship is alleged upon the record, it can be traversed only by a plea to the jurisdiction, and at the trial it is not necessary to give any evidence of citizenship; it is conclusively admitted by pleading to the merits. It is not so, however, in reference to this point of the competency of the assignee to sue on a *chose in action* depending upon the competency of his assignor. He must prove at the trial, not that he is a citizen, — because he has alleged that on the record, and it is admitted conclusively; but he must prove that his assignor, who appears upon the face of the note as indorser, or upon the back of the bond or otherwise as the assignor of the bond or whatever may be the *chose in action*, — he must prove at the trial that his assignor was competent to sue, otherwise he fails. This was decided in the case of *Bradley v. Rhines' Adm'rs*, 8 Wallace, 898.

## CHAPTER V.

### THE CIRCUIT COURTS (*continued*).

I now desire to turn to . . . the jurisdiction of the Circuit Courts arising out of the subject-matter of the suits.

In order to have a clear view of this, it is necessary to refer to the second section of the third article of the Constitution, which I will read to you:—

“The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction.”

There we have the entire grant of judicial power made to the United States on account of the subject-matter. Then follows a grant depending upon the character of the parties. You will perceive that subject-matter is “all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all

cases of admiralty and maritime jurisdiction.” The nature and extent of this grant of power were considered with very great care, and with his usual ability, by Chief Justice Marshall, in the case of *Osborn v. The Bank of the United States*, 9 Wheaton, 738. That is a case which I have already more than once mentioned to you, where a suit was brought by the Bank of the United States in the Circuit Court, under a provision in its charter to that effect, allowing it to sue in the Circuit Courts of the United States. It was insisted that that was not within the grant of judicial power in the Constitution; but it was held that, inasmuch as this corporation owed its existence to a law of the United States, any suit which it could bring might properly be said, in reference to this grant of power in the Constitution, to arise under a law of the United States, and that therefore it was competent to sue on account of the subject-matter. At first view, it might seem to depend on the character of the party, and in one sense it did; but it was the character of the party derived from a law of the United States; and it is the examination of the extent of this grant which gives so much value to the opinion of the Chief Justice in that case.

Now, under this grant of power, you will find, in the first place, that Congress has conferred upon the Circuit Courts full jurisdiction, both at law and in equity, over patent and copyright cases. Letters-patent, as you know, are granted by the United States, under the provision made in the Constitution, which enables Congress to grant to authors and inventors, for a limited period, the



exclusive right to their inventions or discoveries. Patents and copyrights, therefore, are grants made by the United States, under laws passed by Congress under the authority of the Constitution; and any case which respects either a patent or a copyright must necessarily be a case arising under a law of the United States.<sup>1</sup> By the fifty-fifth section of the Patent Act of July 8, 1870,<sup>2</sup> full jurisdiction, both at law and in equity, is conferred on the Circuit Courts over patent cases, and by the hundred and sixth section over copyright cases.<sup>3</sup> And this, especially the first, — that is, jurisdiction over patent cases, at law and in equity, — has become, in many parts of the country, perhaps the most important branch of their civil jurisdiction, both in point of magnitude of the interests involved, as well as the amount and quantity of litigation.<sup>4</sup>

<sup>1</sup> [There is a difference of opinion as to whether a patent suit may be brought in any District where service can be had, or whether patent suits are within the Statute of 1887-1888, and consequently must be brought in the District of which the defendant is an inhabitant. *In re Hohorst*, 150 U. S. 653, 661, it is said that they are not within the statute; and this dictum is followed in *Smith v. Sargent M'f'g Co.*, 67 Fed. Rep. 801. But see, *contra*, *Donnelly v. United States Cordage Co.*, 66 Fed. Rep. 613.]

<sup>2</sup> See Revised Statutes, § 629, clause 9. [This section is not repealed by the Act of 1887-1888 regulating the jurisdiction of the Circuit Courts. *Donnelly v. United States Cordage Co.*, *supra*.]

<sup>3</sup> Rev. Stat. § 629, clause 9.

<sup>4</sup> By Section 711 of the Revised Statutes, the jurisdiction of the courts of the United States is made exclusive of that of the State courts in "all cases arising under the patent-right or copyright laws of the United States." It is important for the practitioner to note the sense in which Judge Curtis has used the expression in the text, "any case which respects either a patent or a copyright," etc. A case may respect or relate to a patent or a copyright in one sense, and yet it may not be within the jurisdiction of the Federal courts.

Another subject over which Congress has given these courts jurisdiction is suits arising under laws for the collection of duties on imports. This was done by the act of the 2d of March, 1833, § 2, found in 4 Statutes at Large, 632. The wants of the country having compelled Congress to pass internal revenue acts, they have legislated to give the courts of the United States jurisdiction (and particularly the Circuit Courts, of which we are now speaking) of suits arising under those laws for the collection of internal revenue, or in any manner connected with the administration of those laws. Without commenting particularly upon each one of those statutes, I will give you a reference to them, so that, if you have occasion, you can recur

Thus, if the controversy relates to the title or ownership of the patent or copyright, or to the construction or operation of any contract respecting the title, the case does not "arise under a law of the United States," in the sense in which that phrase is used in the provision of the Constitution which defines the judicial power of the United States. The case arises under the patent or copyright laws of the United States when the controversy relates to the exercise of the exclusive right secured by those laws. There may be cases where the suit involves both the construction of a contract, and the construction of the patent to which the contract relates. In these cases the jurisdiction of the Federal courts, on account of the subject-matter, is not ousted, but, the patent itself being involved, it carries the whole case. (*Littlefield v. Perry*, 21 Wallace, 205.) For the distinctions between cases which arise under the patent laws, and therefore give jurisdiction to the Federal courts, whatever the citizenship of the parties, and those which can only come into that jurisdiction by reason of the citizenship of the parties, see *Curtis on Patents*, § 494, *et seq.*, and the authorities there cited. [See also *Marsh v. Nichols*, 140 U. S. 344; *Hartell v. Tiighman*, 99 U. S. 547; *White v. Larkin*, 144 U. S. 628. The right to sue in equity upon a patent is discussed in *Root v. Railway Co.*, 105 U. S. 189,—an extremely valuable case to the student of equity or of patent law.]

to them. The earliest one is in 13 Statutes at Large, 239, §§ 41, 179; in the same book, 483, § 1, is a provision on this subject; then in 14 Statutes at Large, 111, § 9; 145, § 9; 475, § 10; 483, § 25, are still further provisions; and, lastly, in 15 Statutes at Large, 167, § 106. Congress has also given these courts jurisdiction to administer the laws connected with the Post-Office, to entertain suits for the recovery of penalties, and other subjects which arise in the course of the administration of these postal laws. That legislation is found in 5 Statutes at Large, 739, § 20.<sup>1</sup>

The national banks created by Congress are also authorized to sue and be sued in the Circuit Courts of the United States, although there is concurrent jurisdiction in the courts of the State and county where the bank is located. This act will be found in 13 Statutes at Large, 116, § 57. The language of that statute, you will find on looking at it, is simply an authority to bring suits against the banks. They are made capable of being sued in the Circuit Courts of the United States, or in a State court of competent jurisdiction in the city or county where the bank is located, I think is the language. But the question was made whether that meant that the banks could sue, as well as be sued; and the Supreme Court of the United States, in *Kennedy v. Gibson*, 8 Wallace, 498, decided that the true interpretation of this statute was that the banks might sue, as well as be sued.<sup>2</sup>

<sup>1</sup> The jurisdiction over suits arising under the impost, internal revenue, and postal laws is now vested in the Circuit Courts by § 629 of the Revised Statutes.

<sup>2</sup> See Revised Statutes, §§ 629, cl. 10; 5237. [See p. 117, *supra*.]

There is a provision (and it is a very important one) in this National Banking Act which enables the Comptroller of the Currency, whenever he is of opinion that a bank is in a condition dangerous to the public, to enjoin its further proceedings, take possession of it through a receiver, whom he himself appoints, and wind it up. You perceive that this is a very important power, and one which might, through mistake or any other cause, be greatly abused; and at the same time, I suppose, it is often necessary that great promptness should be used, and that it should be an executive rather than a judicial power; but Congress saw the propriety of subjecting it to the control of the judicial power, and therefore, by a provision in the Banking Act, §§ 50 and 57, they have given to the Circuit Courts of the United States power, on the application of a bank thus proceeded against, to examine, judicially, the question whether a case exists in which the bank is thus dangerous to the public; and if they find the bank not to be in that condition, the court is authorized to enjoin the commissioner from further proceedings in the case.<sup>1</sup>

Similar legislation had occurred much earlier in reference to another class of cases, which is important and interesting in itself. All the officers of the government who collect its taxes, its customs, or any of its moneys, or who are intrusted with the public moneys for the purposes of distribution, are obliged to account, according to law, with some appointed authority in the Treasury Department, or connected therewith; or, if it be the Post-Office

<sup>1</sup> See §§ 5234-5237 of the Revised Statutes.

or the War Department, they are obliged to account with officers who are designated by law for that purpose in those departments. And whenever a balance is found against one of those officers, it is not necessary for the United States to put a claim in suit against him; but on that balance being certified by the proper accounting officer, a warrant of distress issues at once against him and his goods and lands, and against his sureties. That, as you perceive, is an executive act, and one which ought, in some way, to be brought under judicial review; and that has been done. It might be well for you, in reference to this class of cases, to look at the case of *Murray v. Hoboken Land Company*, 18 Howard, 272, where the question was made whether these distress warrants were constitutional; whether it was not a usurpation of power on the part of the executive, under the authority of Congress, to undertake to pass upon the question whether an officer was indebted to the government, and to issue process, in its nature final, to collect that debt, without any judicial inquiry. The Supreme Court decided that it was a constitutional law, for the reasons which you will find assigned there.<sup>1</sup>

Now, Congress has provided, in the statutes to which I will immediately give you a reference, that wherever a distress warrant of this kind issues, the officer against whom it issues may apply to a court of the United States (he may apply to the District Court as well as the Circuit Court); and satisfy that court that there is no occasion for taking the proceedings against him, because the alleged balance

<sup>1</sup> See §§ 3624-3637 of the Revised Statutes.

is not due, or because it is secured; and he is obliged, in some circumstances, to offer a bond, with surety, before the court is empowered to grant an injunction; but when he satisfies the court that the proceedings ought not, in equity and justice, to be pursued any further, the court is authorized to enjoin any further proceedings. This you will find provided for in 3 Statutes at Large, 595, §§ 4, 6, and 4 Statutes at Large, 414, § 1. And inasmuch as the officer proceeded against may apply to a judge of the District Court, as well as to a judge of the Circuit Court, — if he should happen to have done so, and the judge of the District Court should have denied the application, or refused the injunction, there is another statute which gives an appeal to the Circuit Court. That is in 16 Statutes at Large, 44, § 2. So that, if he first goes to a District Judge, and fails there, he may take an appeal from the refusal of the District Judge to the Circuit Court.<sup>1</sup>

Another writ which the Circuit Courts are allowed to issue is not covered specifically by this fourteenth section, but referred to generally. The language is, “to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeably to the principles and usages of law.”<sup>2</sup> Well, the question has arisen, whether the Circuit Courts

<sup>1</sup> See the references in the preceding note. [The appeal lies now not to the Circuit Court, but to the Circuit Court of Appeals. See *ante*, p. 67.]

<sup>2</sup> See Revised Statutes, § 716.

could issue writs of mandamus, either to an inferior tribunal, which is the District Court, or to a public officer, commanding them to do some act, according to the nature of that writ at the common law; and it has been held, in the case of *Riggs v. Johnson County*, 6 Wallace, 166, that the Circuit Courts in the different States have no jurisdiction to issue a writ of mandamus for any other purpose than to carry out their jurisdiction obtained in some other case. If they have a case before them over which they have jurisdiction, and it is necessary to issue a writ of mandamus, in order to carry that jurisdiction into complete effect, then they have power to issue the writ; but they have not the power to entertain a writ, so to speak, where their jurisdiction is founded upon this writ itself. In this case of *Riggs v. Johnson County*, the Circuit Court had rendered a judgment against the county; the county had no property, but the authorities of the county had power to tax its inhabitants to pay its debts, and they refused to do so to pay this debt. The Supreme Court decided that the Circuit Court had power to issue a writ of mandamus to compel the officers of that county to levy a tax, collect it, and pay this debt, because they were only carrying into complete execution, and giving complete effect to, the jurisdiction which they acquired in the suit in which the judgment was rendered; and it was like issuing a writ of execution to collect a debt, for it was but another mode of executing their judgment, rendered necessary by the peculiar character of the debtor.<sup>1</sup>

<sup>1</sup> See Revised Statutes, § 688.

Another very important branch of the jurisdiction of the Circuit Courts is their equity jurisdiction. It is provided in the eleventh section of the Act of 1789 that "the Circuit Courts shall have original cognizance of all suits of a civil nature at common law or in equity," where the other conditions, which immediately follow, exist. In the sixteenth section of the same act is this provision: "That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law." This sixteenth section has been the subject of consideration by the Supreme Court in several cases. In the case of *Boyce v. Grundy*, 3 Peters, 210, it was held that this section was merely declaratory, and made no change in equitable remedies; that, independent of this section, a court of equity, upon the principles which govern these courts, cannot entertain a suit in a case where there is "plain, adequate, and complete remedy at law," and therefore they held that this was a mere declaration of a principle which would have existed outside of the statute. They have also decided, in the case of *Robinson v. Campbell*, 3 Wheaton, 212, that the remedy at law here spoken of is a remedy at the common law of England, and has no reference whatever to the common law or the statute law of the States. You are aware that in all the States, probably, — certainly in most of them, — there are statute remedies which go much beyond the remedies afforded by the common law of England, and which are intended to, and do, have the effect of giving equitable remedies to a



very considerable extent. Now, these State statutes, or any alterations in the common law of the State, by custom or otherwise, — many of which exist in Pennsylvania, — the court held are not to be considered. It is no objection to maintaining a bill in equity in a Federal Court in Pennsylvania, that, according to the common law of Pennsylvania, an action of replevin may be treated like a bill for specific performance, and given the same remedy. You are to look into the common law of England, not the laws of the several States, in considering whether a “plain, adequate, and complete remedy may be had at law.”

Then they have also held, in this case of *Boyce v. Grundy*, to which I just referred, that the remedy at law must be as efficient, complete, and prompt as the remedy in equity. The fact that there is *some* remedy at law, the fact that that remedy has been deemed sufficient, according to the principles of the common law, would not prevent a court of equity, under this section, from entertaining jurisdiction. The remedy must be as prompt, complete, and efficient at law as that which is sought in equity.<sup>1</sup>

There is some special legislation, also, on the subject of injunctions by courts of equity, which it is necessary to notice. It is the Act of March 2, 1793, § 5, and is found in 1 Statutes at Large, 334: —

“Writs of *ne exeat* and of injunction may be granted by any judge of the Supreme Court in cases

<sup>1</sup> The language of the sixteenth section of the Judiciary Act of 1789 is repeated, *in totidem verbis*, in § 723 of the Revised Statutes.

where they might be granted by the Supreme or a Circuit Court; but no writ of *ne exeat* shall be granted unless a suit in equity be commenced, and satisfactory proof shall be made to the court or judge granting the same, that the defendant designs quickly to depart from the United States;” — the object of that writ being, as you know, to prevent a person who is a debtor from going out of the country; it is called a writ of *ne exeat* because it commands him not to go out of the country.<sup>1</sup> Then follows this provision in regard to injunctions: “Nor shall a writ of injunction be granted to stay proceedings in any court of a State; nor shall such writ be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same.”

Under that last provision it has been the practice of the courts of the United States, when a bill is filed for a preliminary injunction, or a motion made for a preliminary injunction, to issue a rule, as it is called, or an order of notice to the opposite party to appear on a day named and show cause why the temporary injunction should not issue; and the practice in this circuit (it may be otherwise in other circuits) is that on the return day of the notice, when the defendant appears by his counsel, an order is made by the court allowing a certain time for the complainant to file his papers in support of his

<sup>1</sup> Writs of *ne exeat* are now regulated by § 717 of the Revised Statutes. They may be granted by a Circuit Court, or by any Circuit Justice, or Judge, but only when a suit in equity has been commenced, and satisfactory proof is made that the defendant designs quickly to depart from the United States.

motion, allowing a further time for the respondent to reply to those affidavits, and still further time for the complainant to put in any rebutting affidavits in answer to those of the respondent, if he sees fit. This practice is particularly applicable in patent cases, which constitute a very large part of the causes which come before the Circuit Court of the United States under its equity jurisdiction, in this part of the country, in the first, second, third, and fourth circuits. In other parts of the country, in the South and extreme West, they are less frequent, but in this part of the country they constitute a very large part of the business of the court in equity, so far as injunctions are concerned.<sup>1</sup>

There is, however, in the seventh section of the Act of June 1, 1872, a provision which qualifies this statute:—

“Whenever notice is given of a motion for an injunction out of a Circuit or District Court of the United States, the court or judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge: *Provided*, that no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order, except within the circuit to which he is allotted, and in causes pending in the circuit to which he is allotted or in such causes

<sup>1</sup> As to injunctions in patent and copyright cases, see Revised Statutes, §§ 4921, 4970.

at such place outside of the circuit as the parties may in writing stipulate, except in causes where such application cannot be heard by the circuit judge of the circuit or the district judge of the district.”<sup>1</sup>

This makes it discretionary, as you perceive, with a judge, when applied to, to grant what they call a “restraining order,” which means an injunction, or means nothing; and this “restraining order” may be so framed as to prevent irreparable injury until the motion for the injunction can be heard. That is, I should think, a very proper provision, because there are cases in which, as soon as notice is given of an application for an injunction, the other party has it in his power to defeat all benefit from the proceeding; as, for instance, where a bill is filed to enjoin the negotiation of a note or bill of exchange. If notice is given of that application, the party can at once negotiate the note or bill, and thus the whole proceeding becomes useless. The purpose of this legislation was to enable the court, *ex parte*, to grant such “restraining order” until they could hear the motion for an injunction.<sup>2</sup>

You will have observed, as I read [the former] section, it provides, “nor shall a writ of injunction be granted to stay proceedings in any court of a State.”<sup>3</sup> The purpose of the framers of this act,

<sup>1</sup> These provisions are re-enacted in §§ 718, 719, of the Revised Statutes.

<sup>2</sup> See also *ante*, pp. 82, 88.

<sup>3</sup> This is now Rev. Stat. § 720, and to the words in the text are added these: “Except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.”

which purpose has been preserved in its administration, was to prevent any interference between the courts of the United States and the courts of the States, and to withhold the power from the courts of the United States to interfere with the proceedings of the courts of the States except by the means which I have previously pointed out to you, — a writ of error to the State court from the Supreme Court of the United States when certain questions were involved, and the power of citizens of other States, and also of the officers of the United States, to remove cases from the State courts, for trial, to the United States courts. With the exception of these proceedings, the United States courts have no power to interfere with the courts in the States; nor, on the other hand, have the courts of the States any power to interfere with the courts of the United States. There is no explicit negative provision in the Constitution or laws of the United States to that effect; but it has been decided by the Supreme Court in several cases that the courts of the States cannot enjoin any proceedings, or interfere in any way with the courts of the United States. The earliest case on this subject is the case of *McKim v. Voorhies*, 7 Cranch, 279. There was a previous case, however, which related to the subject, of *Diggs v. Wolcott*, 4 Cranch, 179; and there is a more recent one, of *Peck v. Jenness*, 7 Howard, 625. If you look into these cases you will see that the view taken by the Supreme Court of the United States is, that subjects within the jurisdiction of the Circuit Courts of the United States, or any other court of the United States, are just

as much removed from the control of the State courts as though they were in a foreign country; that, although they are in the same territory, they are under a different government and a different system of laws, and the State courts have no authority whatever to interfere with them.

Another subject of some importance, and which has occasionally excited a good deal of interest, is the power of the courts of the United States to punish for contempt of their authority. This was originally provided for by the Judiciary Act, § 17: "All the said courts of the United States shall have power to grant new trials, . . . and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." A case occurred in which the District Judge of the State of Missouri punished a lawyer for a contempt, and he was impeached for his conduct on that occasion, — not successfully, because the constitutional majority of the Senate failed to agree that he had committed an impeachable offence; but in consequence of what then occurred an act was passed which is found in 4 Statutes at Large, 487. It is the Act of March 2, 1831, entitled, "An Act declaratory of the law concerning contempts of court;" and it provides that "the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of

any of the officers of said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

The common-law authority of the courts, as it has been exercised in England and in this country, and as it was exercised by Judge Peck in the case I spoke of, extended much wider than this. It extended so far as to punish the editor of a newspaper for publishing an account of a trial while the trial was in progress, and there were many other cases to which this power to punish for contempt extended. It is now restricted either to the action of the court upon its own officers, to prevent them from committing a breach of official duty, or to contempts, as they are called, in the presence of the court, or so near to the court as to disturb its proceedings, or to some misconduct of a juror or other person who disobeys an order of the court. If a juror, for instance, or a witness, disobeys the order of the court to attend, a process of attachment will issue against him under the provisions of this statute; but, with the exception of these cases, the courts of the United States have no power to punish for contempt.<sup>1</sup>

The internal revenue laws of the United States have afforded subjects of jurisdiction, heretofore, by suits to recover back moneys which the persons

<sup>1</sup> The power to punish for contempts is now regulated by § 725 of the Revised Statutes, substantially as stated in the text. See also § 4975.

taxed considered not to be legally demanded of them. There was an act passed on the 30th of June, 1864, which by its fiftieth section provided that the Circuit Courts of the United States should have jurisdiction of these suits in the same manner as of suits to recover back moneys exacted by collectors of customs contrary to law. But I suppose it was found that this gave rise to an inconvenient number of suits, and the collection of the internal revenue was so important, and at the same time attended with so many embarrassments, that Congress, on the 13th of July, 1866, repealed this section; so that there is no longer any remedy whatever in the courts of the United States for persons who have had money illegally exacted from them by an officer of the internal revenue department, — certainly a most material defect in the law. Notwithstanding this, such a party is not without remedy. He may bring a suit in the State courts, and then, under the provision of law which I shall refer to presently, if the officer who is sued sees fit to do so, he can remove the suit into the Circuit Court, so that at last, in almost all cases, these suits would come there.<sup>1</sup>

<sup>1</sup> By the Revised Statutes, § 629, Subdivision 4, original jurisdiction is conferred on the Circuit Courts "*Of all suits at law or in equity, arising under any act providing for revenue from imports or tonnage, except civil causes of admiralty and maritime jurisdiction, and seizures on land or on waters not within admiralty and maritime jurisdiction, and except suits for penalties and forfeitures; of all causes arising under any law providing internal revenue, and of all causes arising under the postal laws.*" [Cases arising under the external revenue laws are now heard by General Appraisers, from whose decision an appeal lies to the Circuit Court. See the Act approved June 10, 1890, 26 Stat. 131, 138, Ch. 407.]



This subject was very fully discussed and considered in the case of *Assessor v. Osbornes*, 9 Wallace, 567, where you will find all the provisions of law commented upon, and the present state of the law upon that subject clearly explained.

I have already drawn your attention to the fact that general criminal jurisdiction has been given by the Judiciary Act to the Circuit Courts of the United States over all crimes and offences against the laws of the United States; but besides this general provision there has been a series of acts passed, mainly in connection with the fourteenth amendment to the Constitution, designed to secure to the freedmen their rights as citizens of the United States. I do not think it would be worth while for me to go into details concerning these acts, but merely to say that they all relate to this fourteenth amendment, and to give you a reference to them, so that, if you should have occasion, you can turn to them without difficulty. The earliest one is 14 Statutes at Large, 27, § 3; another one, 14 Statutes at Large, 46, §§ 3, 5; another, 16 Statutes at Large, 438, § 15; still another in the same book, 146, § 23; another, 143, § 12; and still another, 142, § 8. Then the most recent act is 17 Statutes at Large, 13, § 1, and 15, § 6. All these relate to those crimes and offences which are created by these statutes in order to protect the right of the freedmen to vote, as well as their personal safety.<sup>1</sup> There is also a recent act passed, I suppose mainly

<sup>1</sup> For the jurisdiction in this class of cases, consult Revised Statutes, § 629, and the title "Civil Rights." [See also sections 1786, 1977, 1979, 1981, 2010, and 18 Stat. 336, Chap. 114.]

from the same motives, on the 10th of June, 1872, which punishes attempts to influence, intimidate, or impede any grand or petit juror in the course of his duties, or in connection with his duties. This law also makes the Circuit Court one of the tribunals to try the offences.<sup>1</sup>

You are aware, I dare say, that great complaints have been made from time to time, of frauds perpetrated in the procurement of real or simulated papers showing the naturalization of persons with a view to their voting; and in 16 Statutes at Large, 255, § 4, is a law which punishes all fraudulent acts connected with this subject, and gives the Circuit Court jurisdiction to try the offences.<sup>2</sup>

I believe I have now gone through, sufficiently in detail, with all that part of the subject which relates to the jurisdiction of the Circuit Court by reason of the character of the parties, either in original suits brought there, or suits removed there under the different statutes which I have read to you; and I now turn to a different subject-matter.

There is another law giving the Circuit Court of the United States jurisdiction over cases pending in the State courts, which has an interesting historical origin, and which is a law, or might prove to be a law, of very great importance. It is the Act of August 29, 1842, and is found in 5 Statutes at Large, 539.<sup>3</sup> The substance of it is, that if a person should be indicted, or stands indicted, in a

<sup>1</sup> See Revised Statutes, §§ 5404-5406.

<sup>2</sup> See Revised Statutes, § 5424, *et seq.*

<sup>3</sup> This act is substantially embodied in Rev. Stat. § 753.

State court for an act which is avowed by a foreign government as its act, thereupon a petition may be presented to the Circuit Court held in the District where he is thus indicted in the State court, and he may be brought by a writ of *habeas corpus* before the Circuit Court, and either released on bail, or they may take such order as they deem proper in the case. That law arose out of what was called *McLeod's case*, who was indicted in one of the counties in New York, at Utica, I think, for participating in the burning of the *Caroline*, a steamer which was burned in the Niagara River by a party who came over from Canada for that purpose, during the troubles existing in 1842 on that frontier. This steamer had been employed in carrying men and military supplies to an island in the Niagara River, from which it was supposed it was intended to make a military expedition into Canada, and a party came over and burned the steamer in the night, and in the course of this enterprise one man lost his life. McLeod, who had come over from Canada into New York, was indicted for murder as having participated in this act, which resulted in the death of this person. He was tried (this was before this act of Congress was passed) in the State court, and was acquitted on the ground that he was not present, but it was a very threatening matter at the time. The British government avowed the act as being justifiable under the circumstances, and this act of Congress was passed immediately after the conclusion of that case, for the purpose of putting all such cases within the jurisdiction of the national government, which alone can deal with

foreign governments in a diplomatic way, the existence of the several States not being recognized by foreign governments for any purpose of negotiation or responsibility.

Besides this appellate power which the Circuit Courts exercise over final judgments and decrees of the District Court,<sup>1</sup> they have an appellate power over the decrees and proceedings of that court in bankruptcy.<sup>2</sup> The Bankruptcy Act, in its second section, found in 14 Statutes at Large, 518, gives to the Circuit Courts a general superintendence over all proceedings of the District Court in bankruptcy, which superintendence is to be invoked by any party aggrieved through a petition filed in the Circuit Court, the proceedings upon which are summary. It is not like an appeal, or writ of error, but it is a somewhat informal application by a petition, the party stating that, under such and such states of fact in the District Court, he is aggrieved, and prays the Circuit Court to take the subject into consideration; and under such a form of proceeding the Circuit Court exercises a general superintendence over all the proceedings of the District Court in the administration of the Bankruptcy Law.<sup>3</sup>

<sup>1</sup> [This power was taken away by the Act of 1891, see page 67, *supra*.]

<sup>2</sup> [See notes 2 and 3, page 102, *supra*.]

<sup>3</sup> [The Circuit Courts also have jurisdiction, without regard to the amount involved, of suits brought under the following special acts: the law against Trusts and Monopolies, 26 Stat. 209; the Contract Labor Law, 26 Stat. 1084; the Interstate Commerce Law, 24 Stat. 379; the law under which land may be condemned for national uses, and that to prevent the unlawful occupancy of public lands, 25 Stat.

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357. The jurisdiction in the Circuit Court of suits brought under the Civil Rights Act is expressly saved by the Act of 1887-1888.

The Circuit Court also has concurrent jurisdiction with the Court of Claims of certain suits against the United States, 24 Stat. 505 ; and exclusive jurisdiction of some minor suits such as those for the collection of penalties for the illegal carrying of passengers in merchant vessels ; but this court has no general jurisdiction to recover penalties or forfeitures ; that belongs to the District Court.]

## CHAPTER VI.

## THE REMOVAL OF SUITS.

[THE laws now in force governing the removal of suits from the State Courts to the Circuit Court are the following: The Act of August 13, 1888 (correcting that of March 3, 1887), which is 25 Stat. 433, chap. 866; and Revised Statutes, §§ 641, 642, 643. Prior to the year 1887, the removal of causes had been governed by four main acts, — the Judiciary Act of 1789, the Acts of 1866 and 1867, both of which related to special matters, and the Act of 1875, which dealt with the whole subject, and repealed the Act of 1789. The present act, that of 1887–1888, amended and substantially repealed the Act of 1875.

The Act of 1866 was, as I have said, of a special nature. It provided that in certain cases where one or more of several defendants were citizens of a State other than that in which the suit was brought, the plaintiff being a citizen of that State, such defendants might remove the cause, so far as they were concerned, to the Circuit Court, leaving the plaintiff to proceed against the remaining defendants in the State court. The reason for this peculiar provision was that Congress doubted its power to authorize the removal of the whole case, under

such circumstances, for, if it were removed as to all of the defendants, the case would then be one, in part, between citizens of the same State. This, it was thought, would be unconstitutional, because the Constitution does not extend the judicial power of the United States to controversies between citizens of the same State, except where a Federal question or some matter of admiralty jurisdiction is involved. This act was repealed by the Act of 1875.<sup>1</sup> Both that act, however, and the present act contain similar provisions regarding "separable controversies."

The Act of 1867 was a fruit of the Civil War. It provided for the removal of suits by non-resident plaintiffs or defendants on the ground that by reason of local influence or prejudice they could not obtain a fair hearing in the State court. This act was embodied in the Revised Statutes, as sect. 639, cl. 3, and it was not repealed or altered by the Act of 1875.<sup>2</sup> But it was repealed by the present act,<sup>3</sup> in which there is inserted a similar provision giving the right of removal to defendants only. Aside, therefore, from these particular acts of 1866 and 1867, the right of removal was established by the Judiciary Act of 1789, and repealed and re-established by the acts of 1875 and of 1887-1888.

We have seen already that, so far as the original jurisdiction of the Circuit Court is concerned, the intent of the Act of 1875 was to enlarge, and the intent of the Act of 1887-1888 was to restrict it.

<sup>1</sup> [*Hyde v. Ruble*, 104 U. S. 407.]

<sup>2</sup> [*Hanrick v. Hanrick*, 153 U. S. 192.]

<sup>3</sup> [*Fisk v. Henarie*, 142 U. S. 459.]

This is equally true of those parts of these acts which give to the Circuit Court jurisdiction by removal from State tribunals.<sup>1</sup> The chief points of difference between the several statutes will appear as we go along; but first it might be well to state some general principles which regulate the law of removal.

The power of State legislatures to impose restrictions upon the removal of suits has been discussed in several leading cases, the first two of which arose under a statute of Wisconsin. This statute provided that any foreign insurance company intending to do business in that State should appoint an agent there for the service of process upon it, and also make a written agreement with the State not to remove to the Circuit Court any suit which might be brought against it in the State courts. The statute further provided that if any insurance company violated this agreement its license should be revoked by the Secretary of State. In the first case under this statute a suit had been removed by a foreign insurance company, contrary to its agreement; but the State court, nevertheless, went on and pronounced judgment against the company. The United States Supreme Court held that this judgment was void, because the agreement not to remove was illegal. No man, they declared, can bind himself in advance to forego the benefit of such courts as are legally open to him. "He cannot barter away his life, his freedom, or his constitutional rights."<sup>2</sup> The second suit<sup>3</sup> was an appeal

<sup>1</sup> [*Fisk v. Henarie*, 142 U. S. 459, 467.]

<sup>2</sup> [*Home Insurance Co. v. Morse*, 20 Wall. 445.]

<sup>3</sup> [*Doyle v. Continental Insurance Co.*, 94 U. S. 535.]



from an injunction restraining the Secretary of State from revoking the license of an insurance company which had violated the statute in question. The United States Supreme Court held that the injunction was improperly granted. They declared that the State had a right to impose the terms upon which foreign corporations should be permitted to do business within its borders. They held further that although that part of the statute which required a stipulation by foreign corporations to refrain from removing suits was unconstitutional, yet that part which provided that if a foreign corporation did so remove a suit, its license should be revoked, was not unconstitutional. The court said: "The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding which is not the subject of inquiry in determining the validity of a statute." The point thus taken was ingenious, but perhaps a little sophistical. Justices Bradley, Miller, and Swayne dissented from the decision.

In a subsequent case,<sup>1</sup> a similar statute enacted in Iowa, was in question. This statute provided that if any foreign corporation violated its agreement not to remove suits, its license to do business should thereby become void, and any agent of the corporation who continued thereafter to transact its business in the State was made liable to fine and imprisonment. An agent was imprisoned under this statute, and the Supreme Court held that it was unconstitutional, and released him upon a writ

<sup>1</sup> [*Barron v. Burnside*, 121 U. S. 186.]

of *habeas corpus*. As to *Doyle v. Continental Insurance Company*, the court said: "The point of the decision seems to have been that as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it." In another case, a statute of Pennsylvania was considered. This statute attempted to confer upon a State court exclusive jurisdiction of all proceedings involving the settlement of estates of deceased persons. It was held that the statute could not defeat the right to bring a suit in the Circuit Court or to remove it to that court.<sup>1</sup>

These cases make it sufficiently clear that the right of removal cannot be taken away or restricted by State legislation.

Some minor points of a preliminary nature should also be stated here.

The jurisdiction being an original one, not appellate, it is not affected by the Act of 1891, which took away all appellate jurisdiction from the Circuit Courts.<sup>2</sup> The right of removal is not a vested right of property; it relates to the remedy only, and consequently a Federal statute restricting the right of removal applies to cases then pending in the State courts, as well as to future cases.<sup>3</sup> One of several defendants cannot remove a suit, except in cases of "separable controversy," presently to be considered, and except also when formal or unnec-

<sup>1</sup> [*Clark v. Bever*, 139 U. S. 96. See also *Markwood v. Southern Ry. Co.*, 65 Fed. Rep. 817.]

<sup>2</sup> [*Dennistoun v. Draper*, 5 Blatch. 336.]

<sup>3</sup> [*Manley v. Olney*, 32 Fed. Rep. 708.]

essary parties are joined as defendants.<sup>1</sup> Otherwise, it is doubtful if a single defendant can remove a suit even when the other defendants have defaulted.<sup>2</sup> He certainly cannot do so when the time within which the other defendants must petition for removal has expired.<sup>3</sup> A purchaser *pendente lite* has no greater right of removal than his vendor had.<sup>4</sup> A merely colorable assignment does not confer the right to remove; but the Circuit Court cannot take jurisdiction of a case when a colorable assignment has been made expressly to prevent removal.<sup>5</sup> A conditional application for removal has no legal effect.<sup>6</sup> The removal is to the Circuit Court for that district where the suit is pending, although it may have originated in a different district.<sup>7</sup> Attachments of property, bonds of indemnity, and writs of injunction are not dissolved by removal.<sup>8</sup> As to waiver of the right to remove, see *Amy v. Manning*,<sup>9</sup> and the American and English Encyclopædia of Law, vol. 20, p. 1010.

I now proceed to state the substance of the Removal Acts which are at present in force, namely,

<sup>1</sup> [See *infra*, p. 194.]

<sup>2</sup> [*Sinclair v. Pierce*, 50 Fed. Rep. 851; *Putnam v. Ingraham*, 114 U. S. 57.]

<sup>3</sup> [*Rogers v. Van Nortwick*, 45 Fed. Rep. 513.]

<sup>4</sup> [*Jefferson v. Driver*, 117 U. S. 272.]

<sup>5</sup> [*Oakley v. Goodnow*, 118 U. S. 43. This case was decided under sect. 5 of the act of March 3, 1875; and that section, excepting the part giving an appeal to the Supreme Court, was expressly saved by the present act.]

<sup>6</sup> [*Manning v. Amy*, 140 U. S. 137.]

<sup>7</sup> [*Hess v. Reynolds*, 113 U. S. 73.]

<sup>8</sup> [Revised Statutes, 646.]

<sup>9</sup> [144 Mass. 153.]

the Act of 1887-1888 (25 Stat. 433), and Revised Statutes, sects. 641, 642, 643. The Act of 1887-1888 provides as follows:—

Removal may be had of civil suits at law or in equity, which might have been begun in the Circuit Court,<sup>1</sup> in the following cases:—

(a) Where the case arises under the Constitution, laws, or treaties of the United States, and more than \$2000, exclusive of interest and costs, are involved. The defendant only may remove.

(b) Where the suit is between citizens of different States, and more than \$2000, as aforesaid, are involved. The defendant, if a non-resident<sup>2</sup> of the State, may remove.

(c) Where the suit is between citizens of a State and foreign states, citizens, or subjects, and more than \$2000, as aforesaid, are involved. The defendant, if a non-resident, may remove.

(d) Where the United States are plaintiffs or petitioners. The defendant, if a non-resident, may remove without regard to the amount involved.

(e) Where the suit is between citizens of the same State claiming lands under grants of different States, and more than \$2000, as aforesaid, are involved. The plaintiff or defendant may remove.<sup>3</sup>

<sup>1</sup> [*Reed v. Reed*, 31 Fed. Rep. 49.]

<sup>2</sup> [*Martin v. Snyder*, 148 U. S. 663.]

<sup>3</sup> [The statute, in this case, provides that "any one or more of the plaintiffs or defendants, before the trial" may advise the court "that he or they claim and shall rely upon a right or title to the land, under a grant from a [particular] State," producing the grant or a copy thereof, "except where the loss of public records prevents its production." Thereupon he or they may move "that any one or more of the adverse parties inform the court whether he or they claim a right or title to the land, under a grant from some other State. If

(f) Where a suit, involving more than \$2000,<sup>1</sup> exclusive of interest and costs, is brought in a State court, by a citizen of that State, against a defendant who is neither a citizen of nor a resident in that State, such defendant may remove the suit "at any time before the trial thereof," if he can make it appear to the Circuit Court that owing to local influence or prejudice he cannot obtain justice in the State court in which the cause is pending, *or to which it may be removed for trial under the laws of the State*, by reason of such prejudice or local influence.<sup>2</sup>

"Provided, that if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Circuit Court may direct the suit to be remanded, so far as relates to

the party so called upon gives information "that he or they do claim under such grant from some other State, any one or more of the parties moving for such information may then on petition and bond (as described in sec. 32) remove the cause to the Circuit Court of the United States next to be holden in such district." 25 Stat. 435, chap. 866, sect. 3.]

<sup>1</sup> [The statute is obscure upon this point, and it was held at first, in some circuits, that the money limit did not apply to "local influence" cases. The Supreme Court, however, have decided otherwise. See *In re Pennsylvania Co.*, 137 U. S. 451.]

<sup>2</sup> [The sentence italicized contains a provision which was not found in the Act of 1867. It merely requires the defendant to make it appear to the Circuit Court, when the laws of the State provide for a change of *venue* from one county to another, that local prejudice or influence would operate against him in any other State court that might be open to him, as well as in that where the suit is pending. See *Rike v. Floyd*, 42 Fed. Rep. 247.]

such other defendants, to the State court, to be proceeded with therein." The statute then provides that after a case has thus been removed, the Circuit Court shall, upon application of the other party, examine into the facts alleged in the affidavit for removal, and if it finds that the alleged prejudice or local influence does not exist, it shall remand the case to the State court whence it was removed, and from the decision so remanding there shall be no appeal.

Many decisions have been made upon the construction of this part of the statute, the more important of which will be stated presently. There is one more class of cases made removable, namely, those which contain a "separable controversy," — which were first provided for by the Act of 1866. As to these the statute runs as follows:—

"And when in any suit mentioned in this section [*i. e.*, any of the suits made removable by the statute] there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."<sup>1</sup>

Under this head the plaintiff cannot remove. There is a difference of opinion as to whether the defendant must be a non-resident in order to have

<sup>1</sup> [The language of this section is precisely the same that it was in the Act of 1875, except that by that Act the right of removal was given to plaintiffs, as well as to defendants. So far as defendants are concerned, therefore, all decisions made under the Act of 1875 as to Separable Controversies, apply also to the present law.]

the right of removing a separable controversy.<sup>1</sup> An alien defendant cannot remove under this clause.<sup>2</sup> A suit removable on this ground is defined by Judge Thayer as one "in which there are two or more controversies or causes of action capable of separation into two or more independent suits, one of which controversies is 'wholly between citizens of different States.'"<sup>3</sup>

A separable controversy, it must be remembered, is not removable simply because it is separable. The statute provides only that a controversy which would under the statute be removable by defendants A. B., and not by their co-defendants C. D., may still be removed by A. B., provided that it can be separated, and can fully be determined against A. B. without the presence of C. D.

But a further question arises, Does the "separation" refer to the subject-matter or only to the parties? Must there be, in effect, two causes of action, or may a single controversy be separated, so far as the defendants are concerned, and removed by the non-resident defendants? A single controversy is certainly not removable according to the definition just quoted, or according to the opinion of the Supreme Court upon which that definition is founded. So in *Bellaire v. Baltimore & Ohio R. R.*,<sup>4</sup> the pro-

<sup>1</sup> [*Thurber v. Miller*, 67 Fed. Rep. 371, holds that he must be. *Contra, Stanbrough v. Cook*, 38 Fed. Rep. 369.]

<sup>2</sup> [*Merchants Cotton Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 385.]

<sup>3</sup> [See also *Fraser v. Jennison*, 106 U. S. 191; *Torrence v. Shedd*, 144 U. S. 527; *Wilson v. Oswego Township*, 151 U. S. 56, 66; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368; *Barth v. Coler*, 60 Fed. Rep. 466.]

<sup>4</sup> [146 U. S. 117.]

ceeding sought to be removed was a petition to condemn land. The Supreme Court said "that controversy was not the less a single and entire one, because the two defendants owned distinct interests in the land, and might be entitled to separate awards of damages;" thus implying that a single controversy cannot be a separable controversy; and they continue: "The ascertaining of those interests and the assessment of those damages were but incidents to the principal controversy, and did not make that controversy divisible so that the right of either defendant could be fully determined by itself, apart from the right of the other defendant, and from the main issue between both defendants on the one side and the plaintiff on the other."

Nevertheless, there are authorities which hold that a single controversy may be a "separable controversy," and may be removed by a non-resident defendant; and it seems to be a fact that the attention of the Supreme Court has never been called directly to this point.<sup>1</sup>

On the whole, then, it appears that under the present law, the Act of 1887-1888, there is only one case in which the plaintiff may remove a suit, namely, where the suit is between citizens of the same State claiming lands under grants of different States, and more than \$2000, exclusive of interest and costs, are involved. In all other cases the defendant alone can remove; and the only cases in which the defendant, who is a resident of the State where the suit is brought, can remove, are the following:—

<sup>1</sup> [See *Garner v. Second National Bank*, 66 Fed. Rep. 369, where the authorities are cited.]



(a) Where the case arises under the Constitution, laws, or treaties of the United States, and more than \$2000, exclusive of interest and costs, are involved; and —

(b) Where the suit is between citizens of the same State claiming lands under grants of different States, and more than \$2000, as aforesaid, are involved.

Purely formal or unnecessary resident defendants are often joined, and sometimes for the express purpose of preventing the non-resident defendants from removing the suit. It is held in such cases that the non-resident defendants may remove the suit, disregarding the others.<sup>1</sup> So, also, the fact that parties who refuse to join as plaintiffs are made defendants, will not prevent other defendants who possess the requisite citizenship from removing the suit.<sup>2</sup>

Under this statute, the only case in which a suit can be removed without regard to the amount involved is that where the United States are plaintiffs or petitioners. In such a case, the defendant, if a non-resident, may remove.

The Act of 1875, which the present act superseded, made the jurisdiction of removal suits very much wider than it had been before, or than it is now. Under that act, the money limit was only \$500, and all controversies between citizens of different States were removable, whether the defend-

<sup>1</sup> [*Arrowsmith v. Nashville & D. R. R. Co.*, 57 Fed. Rep. 165; *Shattuck v. North British & Mercantile Insurance Co.*, 58 Fed. Rep. 609. As to who are not merely formal defendants, see *Wilson v. Oswego Township*, 151 U. S. 56.]

<sup>2</sup> [*Edgerton v. Gilpin*, 3 Woods, 277.]

ant was a resident or non-resident; and they were removable by the plaintiff as well as by the defendant. Under that act also, if the Circuit Court, finding that a case had improperly been removed, remanded it to the State court, there was an appeal from this decision to the Supreme Court. But under the present act there is no appeal from such a decision.<sup>1</sup>

I have now stated the jurisdiction in removal cases, which is conferred by the Act of 1887-1888. That act expressly saved Revised Statutes, sections 641, 642, 643; and section 644 appears not to have been repealed by it. These sections give the defendant, whether resident or non-resident, a right to remove in the following cases, without regard to the amount of money involved, and these are the only cases in which criminal suits are removable.

(1) "When any civil suit or criminal prosecution is commenced in any State court, for any cause whatever, against any person who is denied, or cannot enforce in the judicial tribunals of the State . . . any right secured to him by any law providing for the equal rights of citizens of the United States," etc.

(2) "When any civil suit or criminal prosecution is commenced in any State court against any officer . . . acting by authority of any revenue<sup>2</sup> law of the United States . . . on account of any act done under color of his office,"<sup>3</sup> etc.

<sup>1</sup> [*Joy v. Adelbert College*, 146 U. S. 855.]

<sup>2</sup> [The postal laws are revenue laws. See *Warner v. Fowler*, 4 Blatchf. 311.]

<sup>3</sup> [*Carico v. Wilmore*, 51 Fed. Rep. 196; *Virginia v. Paul*, 148 U. S. 107. This provision was enacted first in 1833, being known as the Force Bill]

(3) Whenever a personal action has been brought . . . in any State court, by an alien, against any citizen of a State, who is, or at the time the . . . action accrued, was a civil officer of the United States, being a non-resident of that State, wherein jurisdiction is obtained by the State court by personal service of process," etc.

Under these sections a case may be removed by the defendant "at any time before the trial or final hearing of the cause;" but it is held that the case cannot be removed before an indictment against the defendant has been found in the State court.<sup>1</sup>

The formalities by which a removal is to be effected are provided for in the statute only as follows: In all cases except those of "local influence," the applicant "may make and file a petition in such suit, in such State court, at the time or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." He must also file a bond, with surety, conditioned upon his entering in the Circuit Court a copy of the record, and also conditioned upon payment of costs incurred in that court, in case the suit is remanded to the State court. "It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered, as aforesaid, in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been origin-

<sup>1</sup> [*Tennessee v. Davis*, 100 U. S. 257; *Strauder v. West Virginia*, 100 U. S. 303.]

ally commenced in the said Circuit Court." The objection that the petition for removal was filed too late in the State court, cannot be taken upon writ of error to the Supreme Court, after the case has proceeded to trial in the Circuit Court.<sup>1</sup>

The petition for removal must of course state the grounds upon which removal is sought, and after it has been filed in the State court the duty of that court is to assume that the facts stated are true, and then to decide whether on those facts the law allows a removal. It is for the Circuit Court alone to pass upon the truth of the facts stated in the petition. There have been many decisions the other way, but the point is now settled.<sup>2</sup> The theory is that if a proper bond, and a petition stating a proper case for removal, are filed in the State court, thereupon the case is removed, although the State court may refuse to make an order for removal, and may proceed with the cause.<sup>3</sup> In such a contingency, the defendant's remedy is a writ of error to the United States Supreme Court after a final decision has been made in the highest court of the State to which the case can be carried. The defendant may defend the suit in the State court, or not, as he chooses; and he does not, by defending the suit in the State court, forfeit his right to remove it.<sup>4</sup> Thus it might happen that both the State court and the Circuit Court should be trying the

<sup>1</sup> [*Martin v. Baltimore & Ohio R. R. Co.*, 151 U. S. 673.]

<sup>2</sup> [*Stone v. South Carolina*, 117 U. S. 430; *Kansas City R. R. v. Daughtry*, 138 U. S. 298.]

<sup>3</sup> [*Marshall v. Holmes*, 141 U. S. 589.]

<sup>4</sup> [*McMullen v. Northern Pacific Ry. Co.*, 57 Fed. Rep. 16.]

same suit at the same time, although "comity" would in most cases prevent this result.<sup>1</sup> Neither court has power to stop proceedings in the other. But the Circuit Court can issue a writ of *certiorari* commanding the State court to send a copy of the record in any cause to the Circuit Court; and if the clerk should refuse to do so, he becomes liable to fine and imprisonment.<sup>2</sup>

If, however, the Circuit Court decides that the case is not removable, either because the facts stated in the petition for removal are not true, or because the case so stated does not come within the statute, it remands the case to the State court, and from that decision, as we have seen already, there is no appeal. A motion to remand may be made by the plaintiff at any time after the case has been removed. But, if a want of jurisdiction appears upon the record, or even if the petition for removal was not filed within the statutory time,<sup>3</sup> it is the duty of the Circuit Court, of its own motion, to remand the case. If, however, the court does take jurisdiction, and the plaintiff makes no objection, he cannot, upon writ of error to the appellate court, complain that the petition was filed too late.<sup>4</sup> If a case is removed to the Circuit Court, and decided there, upon its merits, against the plaintiff, he may either appeal the whole case to the Circuit Court of Appeals (if it be appealable

<sup>1</sup> [*Springer v. Howes*, 69 Fed. Rep. 849.]

<sup>2</sup> [This provision existed in the Act of March 3, 1875, and it was not repealed by the present Act.]

<sup>3</sup> [*Bowers v. Supreme Council, American Legion of Honor*, 45 Fed. Rep. 81.]

<sup>4</sup> [*Martin v. Baltimore & Ohio R. R.*, 151 U. S. 673, 687.]

to that court), or take a writ of error directly to the Supreme Court, to contest the right of removal to the Circuit Court.<sup>1</sup> If the case were appealable directly to the Supreme Court, that court would consider first the question of jurisdiction, and it would not pass upon the merits of the case unless it found that the suit had rightly been removed. When the ground of removal is that the case is one arising under the Constitution, laws, or treaties of the United States, the fact that it does so arise must appear from the *plaintiff's* pleadings in the State court: if it does not thus appear, "the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings."<sup>2</sup> In the first of the cases cited in the note to this point, there was a strong dissenting opinion, by Justices Harlan and Field, in which they said that the effect of this decision is "to make the right of the defendant, in a suit arising under the Constitution or laws of the United States, or under a treaty, to remove it from the State court, depend upon the inquiry whether the suit was one in respect of which the original jurisdiction of the Circuit Court could be invoked by the plaintiff."

On the other hand, if the ground of removal is diversity of citizenship, that fact may be made to appear for the first time in the petition for removal;<sup>3</sup> but the petition must show of what States, respectively, the parties were citizens at the time when

<sup>1</sup> [*McLish v. Roff*, 141 U. S. 661, 668.]

<sup>2</sup> [*Tennessee v. Union & Planters' Bank*, 152 U. S. 454; *Chappell v. Waterworth*, 155 U. S. 102, 107.]

<sup>3</sup> [*City of Ysleta v. Canda*, 67 Fed. Rep. 6.]

the suit was begun.<sup>1</sup> Moreover, the requisite diversity of citizenship must exist, not only when the suit was begun in the State court, but also when the petition for removal is filed; and if the record is deficient in either of these respects, it cannot be amended in the appellate court.<sup>2</sup> Want of jurisdiction cannot be waived; and if a case has improperly been removed, and tried without objection in the Circuit Court, it will, nevertheless, be remanded to the State court when it comes up by appeal or writ of error to the Circuit Court of Appeals, or to the Supreme Court.<sup>3</sup> In stating the ground for removal in such cases, it is important to remember the distinction between residence and citizenship. An averment of residence is not equivalent to an averment of citizenship; and, on the other hand, when it is necessary to aver that the defendant is a non-resident of a certain State, it is not sufficient to aver that he is a citizen of another and different State, — he may be a citizen of one and yet reside in the other.<sup>4</sup>

So also a case is not removable unless it appears on the record that the statutory amount is involved; and if it does not so appear, the case will be remanded, on appeal, even after trial in the Circuit Court.<sup>5</sup>

<sup>1</sup> [*Mattingly v. Northwestern Virginia R. R. Co.*, 158 U. S. 53.]

<sup>2</sup> [*Grand Trunk Ry. Co. v. Twitchell*, 59 Fed. Rep. 727.]

<sup>3</sup> [*Mattingly v. Northwestern Virginia R. R. Co.*, 158 U. S. 53; *Southwestern Telegraph & Telephone Co. v. Robinson*, 48 Fed. Rep. 769 (citing the Supreme Court cases).]

<sup>4</sup> [*Neel v. Pennsylvania Co.*, 157 U. S. 153.]

<sup>5</sup> [*Tod v. Cleveland & M. V. Ry. Co.*, 65 Fed. Rep. 145.]

Another point as to which many conflicting decisions have been made is when and how should the petition for removal be addressed to the State court. May it simply be filed in the clerk's office, or must it be presented to the court; and can it be filed when the court is not sitting? The better opinion is, I think, that the petition need not be filed in term time, and that it need not be presented to the court.<sup>1</sup>

The petition must be filed at or before the time when the defendant would be required to "answer or plead," if the case had remained in the State court. There have been many decisions also upon this requirement, but very few of them can be referred to here. "Answer" includes "demurrer"; and an extension of time for answering, whether made by order of the court<sup>2</sup> or by consent of counsel, does not ordinarily extend the time for removing. But it does have that effect under the New York code.<sup>3</sup>

If the defendant files his pleading before he is required by law to do so, that does not restrict the time within which he may file a petition for removal.<sup>4</sup>

<sup>1</sup> [*Noble v. Massachusetts Benefit Association*, 48 Fed. Rep. 337. Contra, *Hall v. Chattanooga Agricultural Works*, 48 Fed. Rep. 599.]

<sup>2</sup> [*Ruby Canon Gold Mining Co. v. Hunter*, 60 Fed. Rep. 305. Contra, *Wilcox & Gibbs Guano Co. v. Phoenix Insurance Co.*, 60 Fed. Rep. 929.]

<sup>3</sup> [*Rycroft v. Green*, 49 Fed. Rep. 177. See generally on this subject, *Kansas City R. R. v. Daughtry*, 138 U. S. 298; *Manning v. Amy*, 140 U. S. 137.]

<sup>4</sup> [*Conner v. Skagit Cumberland Coal Co.*, 45 Fed. Rep. 802. But there can be no removal if the case is heard on demurrer or plea



The petition must be filed at or before the time when the defendant would be required to file any pleading whatever, whether to the merits or in abatement. Thus the Supreme Court say: "Congress contemplated that the petition for removal should be filed in the State court, as soon as the defendant was required to make any defence whatever in that court, so that if the case should be removed the validity of any or all of his defences should be tried and determined in the Circuit Court of the United States."<sup>1</sup>

What has now been said applies to all cases other than those of local influence, and in part to those cases also. But in local influence or prejudice cases the procedure is different in the following respects: The petition and bond are filed not in the State court, but in the Circuit Court, and this may be done, in the language of the statute "at any time before the trial thereof." The Supreme Court have interpreted this to mean: "before or at the term at which the cause could first be tried, and before the trial thereof;" and also, as, before or at "the first term in which the cause would stand for trial if the parties had taken the usual steps as to pleadings and other preparations."<sup>2</sup>

The Supreme Court have prescribed certain formalities for removing cases of this kind beyond those required by the statute. They say:—

before the time for answering or pleading has expired: *Fidelity Trust & Safety Vault Co. v. Newport News & M. V. Co.*, 70 Fed. Rep. 403.]

<sup>1</sup> [*Martin v. Baltimore & Ohio R. R. Co.*, 151 U. S. 673, 687.]

<sup>2</sup> [*Fisk v. Henarie*, 142 U. S. 459, 466. As to what is meant by "trial," see *City of Detroit v. Detroit City Ry. Co.*, 54 Fed. Rep. 1, 7.]

"The right to a removal is determined by the Federal court, and determined upon evidence satisfactory to it. When it is satisfied that the conditions exist, the defendant may remove; how? The proper way is for him to obtain an order from the Federal Court for the removal, file that order in the State court, and take from it a transcript, and file it in the Federal court. It may be said that these steps are not in terms prescribed by the statute. That is true; and [it is] also true that no specific procedure is named. The language simply is that the defendant may remove, when he has satisfied the Federal court of the existence of sufficient prejudice. The statute being silent, the general rules in respect to the transfer of cases from one court to another must obtain. . . . At any rate, if these exact steps are not requisite, something equivalent thereto is. If there had been more attention paid to these matters in removal proceedings, there would have been less irritation prevailing in State tribunals at removals."<sup>1</sup> It was held in this case that an entry in the record in the Circuit Court, finding a right to remove on the ground of local influence, but making no order to that effect, did not operate as a removal. But if, without making such an order, the Circuit Court had proceeded with the suit, and the plaintiff had contested it,—in that case, it seems that the want of an order would have been waived.<sup>2</sup>

The defendant presents his case for removal on the ground of local influence by means of an affi-

<sup>1</sup> [*Pennsylvania Co. v. Bender*, 148 U. S. 255.]

<sup>2</sup> [*Tod v. Cleveland & M. V. Ry. Co.*, 65 Fed. Rep. 145.]

davit or affidavits. Under the law as it stood prior to 1887, it was sufficient for him to state his belief that he could not obtain a fair trial in the State court. But under the present act he must go further and offer proof in support of his statement; and what must be the extent of that proof the Supreme Court have indicated as follows:—

“Our opinion is that the Circuit Court must be legally (not merely morally) satisfied of the truth of the allegation that from prejudice or local influence, the defendant will not be able to obtain justice in the State court. Legal satisfaction requires some proof suitable to the nature of the case; at least an affidavit of a credible person; and a statement of facts in such affidavit, which sufficiently evince the truth of the allegation. The amount and manner of proof required in each case must be left to the discretion of the court itself. A perfunctory showing by a formal affidavit of mere belief will not be sufficient. If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by affidavit of a person or persons in whom the court has confidence, this may be regarded as *prima facie* proof sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered.”<sup>1</sup>

This seems to contemplate a petition by the defendant stating the facts relied upon, and an affidavit by some other person or persons in support of the petition; and probably the petition should

<sup>1</sup> [*In re Pennsylvania Co.*, 137 U. S. 451, 457.]

be sworn to.<sup>1</sup> It has been much discussed also whether the plaintiff has a right to receive notice of the petition, and, further, whether he has a right to file counter-affidavits, contesting the fact of local prejudice or influence. It seems to be settled that neither right exists under the statute. But the better practice is for the defendant to give to the plaintiff notice of his petition;<sup>2</sup> and it is within the discretion of the court to permit the plaintiff to file counter-affidavits. The whole subject is discussed in *Reeves v. Corning*,<sup>3</sup> where the court refused to consider affidavits offered by the plaintiff, which were not filed until after the motion for removal had been granted.

Equity, as well as common-law, cases are removable under this head; and it may be shown that the judge or judges of the State court, as well as a jury, might be affected by the alleged local influence or prejudice,—such, at least was the decision in a circuit where the State judges are elected by popular vote.<sup>4</sup>

The fact that local influence or prejudice exists as between one defendant and another, gives no right of removal.<sup>5</sup>

<sup>1</sup> [*Hall v. Chattanooga Agricultural Works*, 48 Fed. Rep. 599, 604; *Schwenk & Co. v. Strang*, 59 Fed. Rep. 209.]

<sup>2</sup> [The Circuit Court of Appeals for the eighth circuit have said: "The parties to be affected by the action of the court should have reasonable notice of the application for removal, and an opportunity to contest it." *Schwenk & Co. v. Strang*, *supra*. As to what is such reasonable notice, see *Carson, &c. Lumber Co. v. Holtzclaw*, 39 Fed. Rep. 578.]

<sup>3</sup> [51 Fed. Rep. 774.]

<sup>4</sup> [*City of Detroit v. Detroit City Ry. Co.*, 54 Fed. Rep. 1.]

<sup>5</sup> [*Hanrick v. Hanrick*, 153 U. S. 192.]

A question has been raised whether the wording of the present statute, in respect to local prejudice cases, permits the defendant to remove, when one or more of the plaintiffs are non-residents of the State where the suit is brought. It seems to be settled that in such a case there is no removal.<sup>1</sup> It is more doubtful whether a non-resident defendant can remove if he is joined with other resident defendants, but probably he cannot do so,<sup>2</sup> unless, of course, there is a separable controversy.

The difference between the present law and previous laws as to the removal of cases on the ground of local influence or prejudice, has been stated as follows by the Supreme Court:—

“Under the previous acts the right of removal might be exercised by plaintiff as well as by defendant; the application was addressed to the State court; there was no provision for the separation of the suit; the ground of removal was based upon what the affiant asserted he had reason to believe and believed; and action on the motion to remand could be reviewed on appeal or writ of error, or by mandamus. While under the latter [the present] act the right is confined to the defendant; the application is made to the Circuit Court; the suit may be divided and remanded in part; the prejudice or local influence must be made to appear to the Circuit Court; that is, the Circuit Court must be legally satisfied by proof suitable to the

<sup>1</sup> [*Gann v. Northeastern R. R. Co.*, 57 Fed. Rep. 417.]

<sup>2</sup> [*Anderson v. Bowers*, 43 Fed. Rep. 321. *Contra*, *Haire v. Rome R. R. Co.*, 57 Fed. Rep. 321; *Jackson & Sharp Co. v. Pearson*, 60 Fed. Rep. 113.]

nature of the case, of the truth of the allegation that by reason of those causes the defendant will not be able to obtain justice in the State courts; and review on writ of error or appeal or by mandamus is taken away.”<sup>1</sup>

Now that we have seen by what formalities removal is effected, I shall take up the various clauses of the Act of 1887-1888, the substance of which is given above, and mention a few of the decisions which have been made in construing them.

The preliminary paragraph was as follows: “Removal may be had of all civil suits, at law<sup>2</sup> or in equity, which might have been begun in the Circuit Court, and which involve more than \$2000, exclusive of interest and costs, in the following cases.” Almost every word here has been the subject of litigation. First as to the term “civil.” Suits to recover penalties are criminal suits, and therefore they are not removable.<sup>3</sup> So, an action on a recognizance is of a criminal nature, and cannot be removed. Next, as to the word “suits.” There must be a real and existing contest. Where, for instance, the defendant has been defaulted, there is no right of removal.<sup>4</sup> Whether or not the proceeding in question is a “suit,” must be determined according to the laws and procedure of the State where the question arises. “It must be a

<sup>1</sup> [*Fisk v. Henarie*, 142 U. S. 459, 468.]

<sup>2</sup> [See *Brisenden v. Chamberlain*, 53 Fed. Rep. 307.]

<sup>3</sup> [*Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265; *Ferguson v. Ross*, 38 Fed. Rep. 161.]

<sup>4</sup> [*Berrian v. Chetwood*, 9 Fed. Rep. 678.]

suit commenced in the State court within the meaning of the State law.”<sup>1</sup>

The words “suit” and “controversy” appear to be synonymous in the statute, so far at least as subject-matter (not parties) is concerned;<sup>2</sup> and the Supreme Court have held that a “controversy” is involved “whenever any property or claim of the parties capable of pecuniary estimation was the subject of the litigation, and was presented by the pleadings for judicial determination.”<sup>3</sup>

In a *habeas corpus* suit, the matter involved, being the liberty of the petitioner, is not “capable of pecuniary estimation,” and therefore such a suit is not removable. It was so decided under the Act of 1875,<sup>4</sup> and the decision is equally applicable to the present statute. It is more difficult to decide what is “judicial determination.” There are many semi-judicial bodies, such as Probate Courts and County Commissioners; and proceedings before them are held to be “suits” or not, according as they are more nearly of a judicial or of an administrative nature. In West Virginia there is a tribunal called a “County Court,” one function of which is to hear and decide appeals from the assessment of taxes; and the Supreme Court decided that such an appeal to this body was not a “suit.” They said: “It is true that the tribunal of appeal is called the ‘County Court,’ but it has no judicial

<sup>1</sup> [*In re Receivership of Iowa & Minnesota Construction Co.*, 6 Fed. Rep. 799.]

<sup>2</sup> [The meaning of “controversy” is discussed in *King v. McLean Asylum*, 64 Fed. Rep. 331.]

<sup>3</sup> [*Gaines v. Fuentes*, 92 U. S. 10, 20.]

<sup>4</sup> [*Kurtz v. Moffitt*, 115 U. S. 487.]

powers except in matters of probate. In all other matters it is an administrative board charged with the management of county affairs." And, speaking generally of such tribunals, the court said: "Whatever called, it is not usually a court, nor is the proceeding a suit between parties; it is a matter of administration, and the duties of the tribunal are administrative, and not judicial in the ordinary sense of that term, though often involving the exercise of quasi-judicial functions. . . . We cannot believe that every assessment of property belonging to the citizen of another State can be removed into the Federal courts. Certainly the original assessment . . . could not be called a suit, and could not be thus removed; and there is, justly, no more reason for placing an assessment on appeal within that category. . . . The fact that the board of appeal may swear witnesses does not make the proceeding a suit." <sup>1</sup>

A proceeding to probate a will is ordinarily not a suit.<sup>2</sup> "Yet," the Supreme Court have remarked, "if a contestation arises, and is carried on between parties litigating with each other, the proceeding then becomes a suit."<sup>3</sup> There are many proceedings which, coming at first before an administrative body, do not constitute a suit, but subsequently, on appeal, they come before a judicial body, and form a suit. Thus a proceeding before a mayor and a jury to take land, and to assess damages, became a suit, when, on appeal, it was transferred to a court

<sup>1</sup> [*Upshur County v. Rich*, 135 U. S. 467, 471, 472.]

<sup>2</sup> [*In re Cilley*, 58 Fed. Rep. 977.]

<sup>3</sup> [See also *Brodhead v. Shoemaker*, 44 Fed. Rep. 518.]



of the State.<sup>1</sup> Writs of prohibition and of mandamus are usually, but not always suits.<sup>2</sup> An application by an administrator for a license to sell real estate may be a suit.<sup>3</sup> And so may be a statutory proceeding in a county court to condemn land.<sup>4</sup>

The next words in the preliminary clause of the statute are, "which might have been begun in the Circuit Court." This condition, that a suit cannot be removed to the Circuit Court unless it could have been begun there, probably applies to all classes of cases made removable, including those of "separable controversy" and of "local influence," though it has been decided in some circuits that these two classes are outside of this condition.<sup>5</sup> It is held, however, that a suit is removable, although it could have been begun in the Circuit Court only by consent of the defendant to be sued in that court.<sup>6</sup>

The succeeding words are: "and which involve more than \$2000, exclusive of interest and costs." The amount is determined by the sum stated in the declaration, but if this should manifestly be excessive, the Circuit Court would remand the case to

<sup>1</sup> [*Pacific Removal cases*, 115 U. S. 1. See also *In re The Jarnecke Ditch*, 69 Fed. Rep. 161.]

<sup>2</sup> [*Rosenbaum v. Bauer*, 120 U. S. 450.]

<sup>3</sup> [*Elliott v. Shuler*, 50 Fed. Rep. 454.]

<sup>4</sup> [*Searl v. School District No. 2*, 124 U. S. 197.]

<sup>5</sup> [See *In re Cilley*, 58 Fed. Rep. 977.]

<sup>6</sup> [*Kansas City & T. R. Co. v. Interstate Lumber Co.*, 37 Fed. Rep. 3; *American Finance Co. v. Bostwick*, 151 Mass. 19. There have been numerous decisions on both sides of this question. See *Harold v. Iron Silver Mining Co.*, 33 Fed. Rep. 529.]

the State court.<sup>1</sup> The total sum may be made up of separate items.<sup>2</sup> Where there are several suits between the same parties, all based on the same facts, and there is an agreement that only one suit shall actually be tried, that suit is removable, provided that the aggregate sum involved in all the suits is more than \$2000.<sup>3</sup> When the right to removal is complete, the plaintiff cannot defeat it by reducing his *ad damnum* to a sum less than \$2000.<sup>4</sup> Whether, in estimating the \$2000 required, a counter-claim made by the defendant can be included, is another point upon which the decisions are conflicting. It seems that it cannot be included.<sup>5</sup>

Such being the conditions of removability, I will now give a few illustrations of the more difficult classes of cases made removable by the statute:—<sup>6</sup>

(a) Where the case arises under the Constitution, laws, or treaties of the United States.

In the language of Judge Thayer,<sup>7</sup> “A case is one of Federal cognizance whenever it becomes necessary to construe the Constitution, laws, or treaties of the United States, or to decide as to the

<sup>1</sup> [*Maxwell v. Atchison, &c. R. R. Co.*, 34 Fed. Rep. 286. See *ante*, pp. 88–91, 121–122.]

<sup>2</sup> [*Bernheim v. Birnbaum*, 30 Fed. Rep. 885; *Armstrong v. Ettlesohn*, 36 Fed. Rep. 209.]

<sup>3</sup> [*Marshall v. Holmes*, 141 U. S. 589, 595.]

<sup>4</sup> [*Kanouse v. Martin*, 15 How. 198; *Louisville & Nashville R. R. Co. v. Roehling*, 11 Ill. App. 264.]

<sup>5</sup> [*La Montagne v. Harvey Lumber Co.*, 44 Fed. Rep. 645; *Bennett v. Devine*, 45 Fed. Rep. 705. *Contra*, *Carson, &c. Lumber. Co. v. Holtzclaw*, 39 Fed. Rep. 578.]

<sup>6</sup> [See *ante*, p. 189.]

<sup>7</sup> [I quote from the pamphlet mentioned in the preface.]

existence of some right, title, privilege, claim, or immunity asserted thereunder.”<sup>1</sup> The case must turn in whole, or in part, upon the alleged Federal question. It is not sufficient that “in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States.”<sup>2</sup>

A controversy involving the authority of the United States to grant a certain land patent is, of course, removable.<sup>3</sup> But if the ownership, and not the validity or construction of the land patent were involved, the case would not be removable.<sup>4</sup> A suit on a judgment recovered in a Federal court does not raise a Federal question, and is not removable.<sup>5</sup> But if the State court should refuse to give effect to that judgment, then a Federal question would arise, and the case would be removable.<sup>6</sup> It has even been held by a Circuit Court that a suit to recover taxes collected under a State statute, which the same Circuit Court had declared in a previous case to be unconstitutional, is not removable. “That decree is merely an item of evidence in the case,” said the court.<sup>7</sup>

Of course the question whether a certain State law impairs the obligation of a contract is remov-

<sup>1</sup> [*Cohens v. Virginia*, 6 Wheat. 264; *Starin v. New York*, 115 U. S. 248.]

<sup>2</sup> [*Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 208.]

<sup>3</sup> [*Mitchell v. Smale*, 140 U. S. 406.]

<sup>4</sup> [*Romie v. Casanova*, 91 U. S. 379.]

<sup>5</sup> [*Provident Savings Society v. Ford*, 114 U. S. 635.]

<sup>6</sup> [*Dupasseur v. Rochereau*, 21 Wall. 130.]

<sup>7</sup> [*Berger v. County Commissioners of Douglas County*, 2 McCrary, 483. See *Leather Manufacturers' National Bank v. Cooper*, 120 U. S. 778.]

able.<sup>1</sup> There are numerous cases dealing with suits by receivers of national banks, who are appointed by the Comptroller of the United States Treasury, and with suits by other receivers who are appointed by the United States courts. There seems to be no distinction between them, so far as suing and being sued are concerned. In either case the receiver is an officer of the United States,<sup>2</sup> and as such within Rev. Stat. sec. 629, which provides that the Circuit Courts shall have jurisdiction "of all suits at common law where the United States, or any officer thereof, suing under the authority of any act of Congress, are plaintiffs." The Circuit Courts, therefore, have jurisdiction originally, and by removal of all suits brought by receivers of national banks,<sup>3</sup> or by receivers appointed by the United States courts. But as to suits against such receivers, the law is not quite so clear. There is no question that when the suit against the receiver concerns his title to the property, or the ownership of the property, it is removable to the Circuit Court.<sup>4</sup> It was held also in *Jewett v. Whitcomb*,<sup>5</sup> that suits for damages against the receiver of a railroad corporation, the receiver having been appointed by a Circuit Court, are removable. On

<sup>1</sup> [Smith v. Greenhow, 109 U. S. 669.]

<sup>2</sup> [Armstrong v. Ettlesohn, 36 Fed. Rep. 209, as to National Bank receivers.]

<sup>3</sup> [See, however, Thompson v. Pool, 70 Fed. Rep. 725.]

<sup>4</sup> [Sowles v. Witters, 43 Fed. Rep. 700. This also was a suit against the receiver of a National Bank.]

<sup>5</sup> [69 Fed. Rep. 417, citing Texas & Pacific Railway Co. v. Cox, 145 U. S. 593, 603, and Tennessee v. Bank of Commerce, 152 U. S. 454, 463, 472.]

the other hand, it was held, that a suit against a receiver (of a national bank), where the only question was as to a set-off claimed by the bank, was not removable.<sup>1</sup> There is a distinction between this case and that decided in *Jewett v. Whitcomb*, for here the cause of action had nothing to do either with the receiver's title, or with his management of the property; whereas in *Jewett v. Whitcomb*, the cause of action was the negligence of persons employed by the receiver, and for whom he was responsible. The two cases, therefore, are not necessarily inconsistent.

Corporations created by acts of Congress may remove actions brought against them on the ground that such actions are suits "arising under the laws of the United States."<sup>2</sup> There was always some doubt whether national banks came within this category; but the present statute solves that doubt, as we have seen, by providing that national banks shall be deemed "citizens of the States in which they are respectively located;" and that the Circuit and District Courts shall have over suits by or against them the same jurisdiction only as if they were individuals.

The next clause in the statute is —

<sup>1</sup> [*Tehan v. First National Bank*, 39 Fed. Rep. 577. *Contra*, *Sowles v. First National Bank of St. Albans*, 46 Fed. Rep. 513; *Evans v. Dillingham*, 43 Fed. Rep. 177.]

<sup>2</sup> [*Pacific Railroad Removal Cases*, 115 U. S. 1; *Union Pacific R. R. v. McComb*, 1 Fed. Rep. 799. There is an act pending in Congress which withdraws this privilege from railroad companies incorporated under United States laws, and makes them, for purposes of jurisdiction, citizens of the respective States in which their lines extend.]

(b) Where the suit is between citizens of different States, and more than \$2000, exclusive of interest and costs, are involved. The defendant, if a non-resident, may remove.

In these cases the requisite diversity of citizenship must have existed not only when the petition for removal was filed, but also when the case was first brought in the State court. It is not sufficient that the plaintiff or defendant changed his citizenship after the suit was brought.<sup>1</sup> An executor, administrator, trustee, guardian, or receiver may remove a suit, accordingly as his own citizenship does or does not permit him so to do, — not the citizenship of those whom he represents.<sup>2</sup> But he can continue a suit removed to a Circuit Court by the person or corporation to whose legal rights he succeeds, although he could not himself have removed it to that court.

A suit between a State on one side, and citizens of another State on the other, cannot be removed on the ground of citizenship, because a State is not a citizen.<sup>3</sup> A corporation is a resident only of the State in which it is incorporated; it is a non-resident of every other State.<sup>4</sup> Consequently, a corporation may remove a suit, as being a non-resident, though it be sued in a State where it transacts business, and has an agent, and is made

<sup>1</sup> [*Stevens v. Nichols*, 130 U. S. 230.]

<sup>2</sup> [*Amory v. Amory*, 95 U. S. 187. See *Grand Trunk Ry. Co. v. Twitchell*, 59 Fed. Rep. 727.]

<sup>3</sup> [*Stone v. South Carolina*, 117 U. S. 430.]

<sup>4</sup> [*Martin v. Baltimore & Ohio R. R. Co.*, 151 U. S. 673; *Southern Pacific Co. v. Denton*, 146 U. S. 202.]

liable to suit by the statutes of the State. And this is true also of suits to which a citizen of a Territory or of the District of Columbia is a party.<sup>1</sup> What constitutes "residence" was discussed in *Rivers v. Bradley*.<sup>2</sup> A suit is removable by non-resident defendants, on the ground of diverse citizenship, although all of the plaintiffs are not residents of the State in which the suit is brought.<sup>3</sup> In fact, it seems to be requisite that all the plaintiffs should be citizens of the State where the suit is brought only in cases of local influence or prejudice.<sup>4</sup>

We have seen in the preceding chapter that an assignee of a *chose in action* cannot sue upon it in the Circuit Court, on the ground of diverse citizenship, unless the assignor could have sued in that court, except in two special cases, those of a foreign bill of exchange, and of a promissory note made by a corporation and payable to bearer. But when the assignee of a *chose in action* brings suit thereon in a court of the State of which he is a citizen against a non-resident of the State, such non-resident may remove the suit to the Circuit Court, without regard to the citizenship of the assignor, if more than \$2000, exclusive of interest and costs, are involved.<sup>5</sup>

<sup>1</sup> [*New Orleans v. Winter*, 1 Wheat. 91.]

<sup>2</sup> [53 Fed. Rep. 305.]

<sup>3</sup> [*Alley v. Edw. Hines Lumber Co.*, 64 Fed. Rep. 903.]

<sup>4</sup> [*Tod v. Cleveland & M. V. Ry. Co.*, 65 Fed. Rep. 145.]

<sup>5</sup> [*Shattuck v. North British & Mercantile Insurance Co.*, 58 Fed. Rep. 609.]

## CHAPTER VII.

## HABEAS CORPUS.

[HABEAS CORPUS is a civil, not a criminal proceeding.<sup>1</sup> It is a suit by itself, and it is never regarded as part of the same suit or proceeding in the course of which the person concerned has been imprisoned.<sup>2</sup>

The Supreme Court, the Circuit Court, the District Court, and the several Justices and Judges thereof, have power to issue writs of *habeas corpus*, in certain cases specified by the statute.<sup>3</sup>

It is a question whether the Circuit Courts of Appeal, or the judges thereof have this power. Probably they do not.<sup>4</sup> That court is one of appellate jurisdiction solely, and the statute creating it is silent upon the subject of *habeas corpus*. It does indeed give to the Judges of that court the same power to issue writs which is conferred by Revised Statutes, sec. 716, upon Justices and Judges of the Federal courts then existing; but this section does not mention and apparently does not include writs of *habeas corpus*. The Circuit Courts of Appeal

<sup>1</sup> [*Ex parte Tom Tong*, 108 U. S. 556.]

<sup>2</sup> [*Ibid.*]

<sup>3</sup> [Rev. Stat. §§ 751, 752.]

<sup>4</sup> [*In re Boles*, 48 Fed. Rep. 75.]



possess, however, a restricted appellate jurisdiction in *habeas corpus* cases, which will shortly be stated.

The Justices of the Supreme Court can issue writs of *habeas corpus* in any part of the country; and they can make them returnable either before themselves or before the court.<sup>1</sup> The inferior courts and Judges can issue this writ only within their respective jurisdictions; that is to say, the Circuit Courts and the Circuit Judges within their respective circuits, and the District Courts and District Judges within their respective districts.

It should be understood that the jurisdiction of the Federal courts upon writs of *habeas corpus* does not extend to all cases where a person is unlawfully deprived of liberty.<sup>2</sup> Their jurisdiction is expressly limited by statute to the following cases:<sup>3</sup>—

(1) When a person is in custody, under or by color of the authority of the United States, or is committed for trial before some court thereof.

(2) When he is in custody for an act done or omitted in pursuance of a law of the United States,<sup>4</sup> or of an order, process, or decree of a court or Judge thereof.

(3) When he is in custody in violation of the Constitution, or of a law or treaty of the United States.

<sup>1</sup> [*Ex parte Clarke*, 100 U. S. 399.]

<sup>2</sup> [*In re Burrus*, 136 U. S. 586, 591.]

<sup>3</sup> [Revised Statutes, § 753.]

<sup>4</sup> [Under this clause, officers of the United States, such as marshals, deputy-marshals, and revenue agents, are protected from molestation by individuals, or by State magistrates, while enforcing the laws of the United States. See *In re Neagle*, 135 U. S. 1,—an extreme case.]

(4) When, being a subject or citizen of a foreign State, and domiciled therein, he is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations.

(5) When it is necessary to bring the prisoner into court to testify.

The Judiciary Act of 1789 did not expressly confer upon the Supreme Court any appellate power over the inferior Federal courts in matters of *habeas corpus*, and this power was first expressly conferred by the Act of Feb. 5, 1867 (14 Stat. 385.) But inasmuch as Congress did not approve of the manner in which the Supreme Court exercised this jurisdiction, it took the power away, or attempted to do so by the Act of March 27, 1868 (15 Stat. 44). The Supreme Court, however, soon decided that, irrespective of any special act, it was possessed of this power under its general authority to issue all writs necessary for the exercise of its jurisdiction.<sup>1</sup>

The way in which the Court arrived at this conclusion is stated by Judge Curtis as follows: "The Supreme Court decided that although they had no direct grant of appellate power, and could not revise the decision of the Circuit Court on a writ of *habeas corpus*, under an appeal, nevertheless, if the Circuit Court had a prisoner brought before it, and remanded him to custody, that prisoner might come before the Supreme Court, and obtain a writ of

<sup>1</sup> [*Ex parte Yenger*, 8 Wall. 85.]

*habeas corpus*, a writ of *scire facias*, or a writ of *certiorari*, to send up the record of the Circuit Court; and the Supreme Court, under these writs, could take jurisdiction, and revise the proceedings of the Circuit Court, and release or remand the prisoner, as required by law."

Later, by the Act of March 3, 1885 (23 Stat. 437) the appellate power of the Supreme Court over the inferior Federal courts, in matters of *habeas corpus*, was expressly restored.<sup>1</sup> This act was an amendment of Revised Statutes, sects. 763, 764, 765, — all of which were repealed by the Act of March 3, 1891.<sup>2</sup> That act, however, the Supreme Court have held, applies to *habeas corpus*, as to all other suits begun in the Circuit or District Court; and some of these suits are made appealable to the Supreme Court, and some to the Circuit Court of Appeals.

The Act of 1891, as the reader will remember, provides first that certain enumerated cases shall be appealable directly to the Supreme Court. These are (1) cases where the jurisdiction of the court is in question; (2) prize causes; (3) cases of capital or otherwise infamous crime; (4) cases involving the construction or application of the Constitution of the United States; (5) cases involving the constitutionality (*not* the construction) of any law of the United States (or any treaty), and (6) cases involving the constitutionality of State Constitutions or laws. Now, most cases of *habeas corpus*, in the Circuit or District Courts, are cases which come under one or another of these heads,

<sup>1</sup> [See *Cross v. Burke*, 146 U. S. 82.]

<sup>2</sup> [*In re Lennon*, 150 U. S. 393.]

and consequently are appealable directly to the Supreme Court.<sup>1</sup>

But suppose, for instance, that a case involves the construction (not the constitutionality) of a law of the United States, so that it is not appealable to the Supreme Court. For example, under the Chinese Exclusion Act (a statute of the United States) a Chinaman was arrested and detained in San Francisco by a United States official. He applied to the Circuit Court for a writ of *habeas corpus*. That court refused it, and he then appealed to the Circuit Court of Appeals, and ultimately the case came before the Supreme Court.<sup>2</sup> The sole point at issue was the construction of the United States statute in question. Was the case appealable to the Circuit Court of Appeals, and if so, was it final in that court? The Act of 1891, after providing, as has just been said, for certain cases appealable directly to the Supreme Court, then goes on to say that all other suits shall be appealable to the Circuit Court of Appeals, and in this general designation *habeas corpus* suits are of course included. Next, the statute states that as to certain suits, which it enumerates, the jurisdiction of the Circuit Court of Appeals shall be final; but this list does not include *habeas corpus* suits. Finally the statute declares that "In all cases not hereinbefore in this section made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United

<sup>1</sup> [Such appeals must be taken within six months. *In re Lennon*, 150 U. S. 393, 399.]

<sup>2</sup> [*Lau Ow Bew*, 144 U. S. 47.]

States, where the matter in controversy shall exceed \$1000 besides costs." A *habeas corpus* suit, like that now under consideration, comes within the first part of this section, since it is not "hereinbefore made final," but it does not fulfil the requirement as to \$1000, inasmuch as it involves no money whatever. Therefore there is no appeal, of right, from the Circuit Court of Appeals; and since no appeal is provided, it is, by implication, "made final" in the Circuit Court of Appeals. It therefore comes within that other clause of the statute which provides that the Circuit Court of Appeals may certify a cause "made final" in that court to the Supreme Court, and, further, that the Supreme Court may require this to be done if, in a proper case, the Circuit Court of Appeals has declined or neglected to do it. Such at least are the conclusions of the Supreme Court in *Lau Ow Bew*.<sup>1</sup>

If, therefore, a *habeas corpus* suit, arising in a Circuit or District Court, does not involve — as it usually does — one of those questions which are appealable directly to the Supreme Court, it is appealable to the Circuit Court of Appeals, and is "made final" there, and can be taken thence to the Supreme Court only by certificate of the Circuit Court of Appeals, or by writ of *certiorari* issued by the Supreme Court.<sup>2</sup> When the writ of *habeas corpus* is issued by a Circuit Judge, and made returnable before him, not before the Circuit Court, there is no appeal from his decision.<sup>3</sup>

<sup>1</sup> [144 U. S. 47.]

<sup>2</sup> [Such a case was *United States v. Pridgeon*, 153 U. S. 48.]

<sup>3</sup> [2 Foster's Federal Practice, p. 751.]

In *King v. McLean Asylum*,<sup>1</sup> it was held by the Circuit Court of Appeals for the first Circuit, upon due consideration, that a petition for a writ of *habeas corpus*, brought by a citizen of one State against a citizen of another State is a "controversy" between citizens of different States, and consequently that the Circuit Court has original, and the Circuit Court of Appeals appellate jurisdiction over it.

But this is not the whole of the so-called appellate jurisdiction of the Supreme Court in cases of *habeas corpus*. If a person is deprived of his liberty, under the circumstances detailed in Revised Statutes, sec. 753 (page 218, *supra*), in the course of a suit in a Circuit or District or Territorial Court, — as, for instance, if, being a United States officer, he is wrongly, as he alleges, indicted for embezzlement, — he may then apply to the Supreme Court for a writ of *habeas corpus*, and in a proper case the Supreme Court will issue the writ, and also a writ of *certiorari* to bring up the record.<sup>2</sup>

It is important to distinguish between this and the former class of cases. In the former class, the writ of *habeas corpus* is granted, or refused, by the Circuit or District Court, to release a person held under authority of a State tribunal; and in these cases the appeal is to the Supreme Court or to the Circuit Court of Appeals, accordingly as the case is provided for in the Act of March 3, 1891. But in the latter class of cases, the writ of *habeas corpus* is granted by the Supreme Court itself to release a

<sup>1</sup> [64 Fed. Rep. 331.]

<sup>2</sup> [See *In re Bonner*, 151 U. S. 242.]

person held under authority of a Circuit or District or Territorial Court, and it is accompanied by a writ of *certiorari* to bring up the record. This jurisdiction is not expressly conferred by statute, but it is derived, as we have seen, from the authority of the Supreme Court to issue all necessary writs.<sup>1</sup> It might be contended, and it may yet be held, that to these cases also the Act of March 3, 1891, applies; and that application for the writ should be made either to the Supreme Court or to the Circuit Court of Appeals, according to the nature of the case. But the Supreme Court have intimated that this jurisdiction is not affected by that act.<sup>2</sup>

As we have seen already, it is not always necessary for a person imprisoned by a State tribunal, contrary, as he alleges, to the Constitution or laws of the United States, to wait until his case has finally been passed upon by the highest court in the State which is open to him. He may apply at any time to the Circuit or District Court for a writ of *habeas corpus*; and if the decision be against him, he may, as we have seen, appeal to the Supreme Court or to the Circuit Court of Appeals according as his case falls within one or the other class of cases distributed by the Act of March 3, 1891.

It is doubtful whether the Supreme Court has power to issue an original writ of *habeas corpus* for the release of a person imprisoned by State authority,<sup>3</sup> except, of course, in "cases affecting ambassa-

<sup>1</sup> [*Ex parte Yerger*, 8 Wall. 85.]

<sup>2</sup> [See *In re Lennon*, 150 U. S. 393, at p. 400.]

<sup>3</sup> [See *Ex parte Royall*, 117 U. S. 254.]

dors, other public ministers and consuls, and those in which a State shall be a party." Of these cases, as the reader will remember, the Supreme Court has original jurisdiction.

Application for the writ of *habeas corpus* may be made to the Circuit or District Court before trial in the inferior State court, or after conviction in that court, and before trial in the State Court of Appeals. But the Federal courts commonly decline to interfere before final conviction, except in cases of urgency.<sup>1</sup> In ordinary cases they leave the defendant to his right, after final conviction in the State court of highest resort open to him, to carry the Federal question involved to the United States Supreme Court by writ of error.<sup>2</sup>

Thus in *New York v. Eno*,<sup>3</sup> the defendant had been indicted by a State court for forgery committed in his capacity as president of a national bank. He applied to the Circuit Court for a writ of *habeas corpus* on the ground that the alleged offence was one against the United States, not against the State, and consequently that his imprisonment by the State was unconstitutional. The Circuit Court released him; but the State appealed, and the Supreme Court reversed the decision of the Circuit Court. They said: —

"Whether an offence described in an indictment in a State court is an offence against the laws of that State, . . . or whether it is made by Federal

<sup>1</sup> [Such a case was *In re Loney*, 134 U. S. 372.]

<sup>2</sup> [See *In re Frederick*, 149 U. S. 70, 77; *Pepke v. Cronan*, 155 U. S. 100.]

<sup>3</sup> [155 U. S. 89. See also *Ornelas v. Ruiz*, 161 U. S. 502.]



statutes an offence against the United States, exclusively cognizable by their courts, and whether the same act may be an offence against both national and State governments, punishable in the tribunals of each, without infringing upon the constitutional guaranty against being twice put in jeopardy [of life] or limb for the same offence; these are questions which the State court of original jurisdiction is competent to decide in the first instance."

In this case, if Eno had finally been convicted by the appellate court of the State, he might then have applied to the Supreme Court for a writ of error. When a case comes up in this way from the State court, or when it is brought up from the Circuit or District Court by a writ of *habeas corpus*, and a writ of *certiorari*, in the manner already described, the Supreme Court will not consider matters of fact, or collateral points of law, but only whether or not the judgment of the court below is void as being contrary to the United States Constitution or laws.<sup>1</sup> On the other hand, when a *habeas corpus* case is taken by appeal from the Circuit or District Court to the Supreme Court or to the Circuit Court of Appeals, the appellate court will consider "all questions of law or fact arising upon the record, including the evidence."<sup>2</sup>

Moreover, the writ of *habeas corpus* cannot be used to perform the office of a writ of error.<sup>3</sup> It is never granted except when the judgment complained of is alleged to be absolutely void under the Con-

<sup>1</sup> [*In re Tyler*, 149 U. S. 164, 180]

<sup>2</sup> [*Johnson v. Sayre*, 158 U. S. 109, 115.]

<sup>3</sup> [*Ex parte Siebold*, 100 U. S. 371; *In re Boyd*, 49 Fed. Rep. 48.]

stitution or laws of the United States, either because the court had no jurisdiction,<sup>1</sup> or because the statute under which the defendant was convicted, was unconstitutional or contrary to a statute of the United States. An erroneous judgment is no ground for a writ of *habeas corpus*. Thus in a recent case the court say: "If an indictment in a State court, under statutes not void under the Constitution of the United States, be defective according to the essential principles of criminal procedure, an error in rendering judgment upon it — even if the accused at the trial objected to it as insufficient — should not be made the basis of jurisdiction in a court of the United States to issue a writ of *habeas corpus*." <sup>2</sup>

<sup>1</sup> [See *In re Tyler, Petitioner*, 149 U. S. 164, 180; *In re Swan, Petitioner*, 150 U. S. 637, 648.]

<sup>2</sup> [*Bergemann v. Backer*, 157 U. S. 655, 659.]

## CHAPTER VIII.

## PROCEDURE AND PRACTICE.

THE subject of several of the last Lectures has been, as you know, the jurisdiction of the Circuit Courts of the United States, and jurisdiction, as you also know, is the power to entertain a suit. Whatever is done in the exercise of that jurisdiction must be done in accordance with different rules of law from those which prescribe the jurisdiction itself. The first question which a court has to consider, always, is the question whether it has the power to entertain the suit at all. The second question is, if it has the power to entertain it, what shall be the rules of decision by which the result in favor of the one party or the other shall be reached.

Having gone through with the consideration of the jurisdiction of the Circuit Courts, I now come to the other inquiry, By what rules of decision are the results of suits over which they have jurisdiction to be reached? Here it will be necessary for you to bear in mind that the Constitution of the United States, and the Acts of Congress framed in accordance with it, have recognized three distinct kinds of jurisprudence to be administered in their

courts in civil cases. The first is the common law, the second is equity law, and the third is admiralty law; and in inquiring what are to be the rules of decision administered by the Circuit Courts of the United States, it is necessary to keep this distinction constantly in view.

In the first place, I will ask your attention to what are the rules of decision in trials at the common law. That is provided for by this Judiciary Act, to which I have had occasion so often to call your attention, in its thirty-fourth section, which reads as follows:—

“That the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”<sup>1</sup>

So that in accordance with this Act of Congress, in any trial which at common law occurs in a Circuit Court, what the practitioner has to inquire, or what the court has to know, is what is the law of the State.<sup>2</sup> If it is a question whether a claim is barred by the statute of limitations, or if it is a question whether a contract is valid or invalid by

<sup>1</sup> Re-enacted, in the same words, in § 721 of the Revised Statutes.

<sup>2</sup> [It was an open question, until recently, whether State statutes applied as “rules of decision” to causes of which the Federal Courts have exclusive jurisdiction, as, for instance, to patent suits. The Supreme Court have recently decided that they do so apply, and that a suit to recover damages for infringement of a patent is barred by a State statute of limitations. See *Campbell v. City of Haverhill*, 155 U. S. 610. The Circuit Courts were divided about equally upon this question.]

reason of the statute of frauds, or if the question be of any other character, with some exceptions, to which I shall presently ask your attention, the inquiry is, What is the law of the State? and that law is to be administered in trials at common law in the Circuit Courts of the United States. It is to be observed, however, that this has reference only to civil cases; it has no application to criminal trials. It is for the government of rights between party and party, in civil cases, in trials at the common law, that this section was made.

Now, the first inquiry which would be found to arise in practice is, Who is to determine what is the law of the State? A question arises upon the construction of the statute of a State, or upon a rule of practice in a State, or upon a commercial contract made in a State, or in a great variety of other cases; who is to decide ultimately what is the law of the State upon that particular question arising in that case? Well, you would naturally say the Supreme Court of the State, which has been intrusted by the constitution of the State with the ultimate decision of such questions, should be the tribunal to decide ultimately what the law of the State is upon any particular question; and that is in general true. The question being what the law of the State is which is to be administered in a particular case, if there can be found in the decisions of the highest court of that State, intrusted with the construction of its statutes and the interpretation and application of its common law, a well-settled rule, in general that is to be deemed

the law of that State.<sup>1</sup> But then it has been found, or supposed to be found, that on some subjects there has been such unsteadiness in the decisions of the State courts that the Supreme Court of the United States have been forced to adopt certain views in regard to the decisions of the highest courts of the State, when they come to be applied in the courts of the United States, to ascertain what the State law is; and therefore it cannot be said to be a universal rule, that, because a question has been settled by the Supreme Court of a State, the decision will be adopted by the courts of the United States; and I now propose to indicate to you the different classes of cases in which it is understood that the decisions of the State courts are final and binding upon the courts of the United States concerning what is the law of the States, and those in which they have not been considered to be final and binding.

In the first place let me refer you to the case of *Webster v. Cooper*, 14 Howard, 488, 504, in which it is said: —

“The thirty-fourth section of the Judiciary Act, as well as the rule of general jurisprudence as to the operation of the *lex loci* upon titles to land [that is the subject of inquiry here], requires us to determine this case according to the law of the State of Maine. In ascertaining what that law is, this court looks to the decisions of the highest court of that State; and where the question turns

<sup>1</sup> [Even in matters of local law, where there is no statute concerned, the Federal courts will follow the decisions of the State Courts. See *Detroit v. Osborne*, 135 U. S. 492, — an extreme case.]

upon the construction to be given to the constitution of the State, and we find a construction made by the highest State court very soon after the constitution was formed, acquiesced in by the people of the State for nearly thirty years, and repeatedly confirmed by subsequent judicial decisions of that court, we cannot hesitate to adopt it and apply it to this case, to which, in our judgment, it is justly applicable. . . . The question has usually been concerning the construction of a statute of a State; but we think there is no sound distinction between the construction of a law enacted by the legislature of a State, and the construction of the organic law ordained by the people themselves. The exposition of both belongs to the judicial department of the government of the State, and its decision is final and binding upon all other departments of that government, and upon the people themselves until they see fit to change their constitution; and this court receives such a settled construction as part of the fundamental law of the State."

This, as you perceive, is in reference both to the construction of State statutes and constitutional questions; the one being enacted by the legislature and the other by the people. You will find occurring in the course of this passage which I have read to you a reference to a decision made by the Supreme Court of the United States, that in the exposition of State statutes and of the constitutions of the States, the Supreme Court of the United States follow the decisions of the highest courts of the State; and the same rule has been applied by the Supreme Court to questions concerning land, —

real property in a State; and if you will refer to the case of *Jackson v. Chew*, 12 Wheaton, 167, you will find the rule there stated, that whenever there is a well-considered decision by the Supreme Court of a State concerning title to lands, that will be received as the official and final exposition of the law of the State upon that question. The question in *Jackson v. Chew* was whether the statute of uses existed, and should be applied, in the State of New York, I think it was; and the highest courts of the State of New York having decided that the statute of uses did exist there, although not enacted, — existed as part of its common law derived from the statute of Henry the Eighth, brought over by those who settled the State, — that rule would be applied by the Supreme Court of the United States, just as it would be applied by the Supreme Court of New York if the same question arose there.<sup>1</sup>

We now come to a different class of cases, and the first of them is, cases which turn upon questions of commercial law and general jurisprudence. You can easily perceive the distinction between this class of cases, — the exposition of the statutes and of the constitution of a State, and the decisions

<sup>1</sup> On this class of questions, where the construction of State statutes affecting the title to lands is to be ascertained, the Supreme Court of the United States follows the last decision of the Supreme Court of the State. *Townsend v. Todd*, 91 U. S. 452. But in any case, there must be a real and direct construction of a State statute by the State court. If the decision of the State court was made upon general principles, and is not a declaration that the statute so declares the law, the Supreme Court of the United States will follow its own construction of the law. *Town of Venice v. Murdock*, 92 U. S. 494. — See Note at the end of this Lecture, on the Existence of State Statutes.



of the highest court of a State concerning the rules of real property in the State, and questions of commercial law and general jurisprudence;<sup>1</sup> and on these questions the courts of the United States do not hold themselves bound by the decisions of the courts of the States, where they are trying cases that do not belong any more to the jurisprudence of that particular State than they do to the jurisprudence of any other State. They are questions which belong to the general law of all States and of the commercial world, and therefore the Supreme Court of the United States holds itself to be competent to decide these questions as it conceives they are required by principle to be decided.

As a statement of this view I will refer you to a short passage found in the case of the *Gloucester Insurance Co. v. Younger*, 2 Curtis's Circuit Court R. 322, as a convenient mode of turning your attention to the authorities on that subject:

"This being a question not of mere local municipal law, but arising under the law merchant, though this court must consider with unaffected respect the decisions of that court [that is, the Supreme Court of Massachusetts] on this question, yet they are not binding on our judgments, and we have no right to conform to them when we believe they do not announce the true rule. This is the settled doctrine of the Supreme Court of the United

<sup>1</sup> [*Balkam v. Woodstock Iron Co.*, 154 U. S. 177; *Bamberger v. Schoolfield*, 160 U. S. 149. In a case which arose in Massachusetts it was not easy to determine whether the question at issue really depended upon a certain local statute, or upon a general principle of common law. *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555.]

States, and has been frequently applied in this court," — and then the decisions are cited, and are brought into convenient proximity, so that you can turn to them if you wish. This doctrine was first annouced authoritatively and explained in the case of *Swift v. Tyson*, 16 Peters, 1; but it is stated with sufficient distinctness in the passage which I have read to you from 2 Curtis's Circuit Courts Reports.<sup>1</sup>

There is another subject upon which the Supreme Court of the United States does not hold itself bound, and of course the Circuit Courts of the United States also, by the decisions of the State courts. You are aware that, under the Constitution of the United States, a State is prohibited from passing any law which impairs the obligation of a contract. Now the question whether there is a contract or not is a question arising under the

<sup>1</sup> [See also *Liverpool Steam Co. v. Phenix Insurance Co.*, 129 U. S. 397, 443; *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368; *Phipps v. Harding*, 70 Fed. Rep. 468. But when the common law upon any given subject has been changed by a State statute, the Federal courts in that State are, as a rule, bound to follow the statute. Thus in a Michigan case involving the question whether the employees of a certain railroad had been negligent in giving notice of an approaching train, there was a State statute which prescribed how such notice should be given, and in construing it the Supreme Court said: "If the construction of this statute by the Michigan courts be as claimed [*sic*] by the defendants, of course this court would feel constrained to adopt the same construction, even if we thought it in conflict with fundamental principles of the law of negligence." *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 422. See also *Northern Pacific R. R. Co. v. Hogan*, 63 Fed. Rep. 102. So a State statute of frauds, even as applied to commercial instruments, such as promissory notes, is a rule of decision in the Federal courts. *Moses v. Laurence County Bank*, 149 U. S. 298. See also *Second National Bank of Aurora v. Basuier*, 65 Fed. Rep. 58.]

laws of the State where the contract is supposed to have been made; and if the State courts were authorized to decide that question finally, you will readily see that this power of revision which resides in the Supreme Court of the United States to determine whether the State law has impaired the obligation of a contract would be of very little utility, because it would be only for the State court to decide there was no contract, and that would be an end to the question. Therefore it has been held by the Supreme Court of the United States, that the question whether there is a contract is a question for them finally to decide; and the decision of a State court, that upon the facts and upon the law of the State there was no contract, is not binding upon the Supreme Court of the United States. This is the doctrine of the court announced in the case of *Ohio Life and Trust Company v. Debolt*, 16 Howard, 432. I have not the book before me, but you will find by looking at the passage that the Chief Justice who gave that opinion says that it is the duty of the Supreme Court, in the first place, to determine whether there was a contract, and, second, to decide whether the law of the State complained of violated the obligation of that contract.

Another class of cases in which the decisions of the State courts have been held not to be final has arisen out of changes in their decisions; and perhaps I can make that plain to you better by stating a particular case in which the question arose, and concerning which there has been a great deal of litigation, which has finally resulted in the settlement of the principle which I will announce. The

State of Iowa authorized its municipal bodies, its cities and its counties, to issue bonds to aid in the construction of railroads. The bonds were issued and sold in the market, were taken in good faith by those who had occasion to invest capital, or who were induced by other reasons to take the bonds, and the question arose whether that was a constitutional act, authorizing those municipal bodies to issue these bonds. It was held by the Supreme Court of the State that it was a constitutional act. Thereupon the sale of the bonds proceeded, and, under the authority of this decision, confiding in its soundness, very large amounts of these bonds were issued. They finally became very burdensome to the people of Iowa and those communities that had issued them, and there was a great change in the popular sentiment of the State; and in consequence of that, their judges being elective, new judges were elected, and a different decision made, — that the legislature of the State had no constitutional power to authorize the cities and towns and counties to issue those bonds. The question came before the Supreme Court of the United States, whether the bonds were valid, and these more recent decisions were relied upon to show that, by the law of Iowa, the legislature had no constitutional right to authorize these corporations to issue the bonds. The court, however, decided that, inasmuch as at the time when the bonds were issued there was a decision of the highest court of that State that this constitutional authority did exist, no subsequent decision could affect the validity of those bonds, and therefore they must be held to be

valid. This decision you will find in the case of *Gelpcke v. Dubuque*, reported in 1 Wallace, 175. Perhaps I may profitably read to you a short passage which states the doctrine upon which the court finally settled, and to which they have ever since adhered, under great opposition, for the interests involved were so large and so important that the subject has frequently been brought before the court; and the doctrine which I will read to you is what the court has ever since adhered to, and what I suppose to be now the law.

The judge who delivered the opinion, Mr. Justice Swayne, says: —

“The late case in Iowa, and two other cases of a kindred character, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety. . . . However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past.”

Now he comes to what the true rule is: —

“The sound and true rule is, that if the contract, when made, was valid by the laws of the State, as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation or decision of its courts altering the construction of the law. The same principle applies where there is a change of judicial decisions as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere; it rests upon the plainest principles of justice. It is the law of this court. To hold otherwise would be as unjust as to hold

that rights acquired under statute may be lost by their repeal. The rule embraces this case.”<sup>1</sup>

There is an earlier case which was the foundation of this one, — the same I referred to under the other head, — reported in 16 Howard, 432,<sup>2</sup> where there is an opinion delivered by Chief Justice Taney, which states with great clearness the ground upon which the Supreme Court is obliged to disregard this change of decision in the State courts in regard to State statutes or State constitutions, when it affects the obligation of contracts made under the faith of a different interpretation by the courts of the State at the time when the contract was entered into.

I believe that is all, gentlemen, which I need say upon the subject of the sources of jurisprudence. To decide cases at law in the courts of the United States, — civil cases, — you go to the law of the State, just as you would if you were to try the case

<sup>1</sup> [In *Burgess v. Seligman*, 107 U. S. 20, 33, the court said: “When contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases, for the sake of harmony, and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt.” In this case the Supreme Court sustained the construction of a State statute made by the Circuit Court in that State, in spite of a contrary decision made by the State court after the decision of the Circuit Court, but before argument in the United States Supreme Court. See also *Knox County v. Ninth National Bank*, 147 U. S. 91, 99; *Forsyth v. City of Hammond*, 71 Fed. Rep. 443.]

<sup>2</sup> [*Ohio Life and Trust Co. v. Debolt*.]

in the highest court of that State; and, except in the class of cases to which I have adverted, — that is, commercial cases, and cases depending upon general jurisprudence, and questions concerning contracts, their existence, their validity, and questions concerning the authority to make contracts, arising out of the constitution or laws of the State changing after the contracts were made, — with these exceptions, I think, you may take it to be true, if you can arrive at the law of the State as it would be administered in its own tribunals, you arrive at the same time at the law which would be administered in the trials of civil cases at common law in the courts of the United States.<sup>1</sup>

But it is very much otherwise when you come to the administration of equity law. The eleventh section of the Judiciary Act confers upon the courts of the United States jurisdiction to try all suits of a civil nature at common law or in equity.<sup>2</sup> In other words, it confers upon the Circuit Courts of the United States a general equity jurisdiction; and the same inquiry arises here as in reference to the common-law suits, Whence are the courts of the United States to derive their rules of decision? The thirty-fifth section, which I have read to you, applies to trials at common law only; it has no reference to equity proceedings. Now, whence are the Circuit Courts, in the administration of this general equity jurisprudence, to derive their rules of decision? The answer is, they are to derive

<sup>1</sup> [*Rice v. Adler-Goldman Commission Co.*, 71 Fed. Rep. 151. See 2 Foster's Federal Practice, p. 776.]

<sup>2</sup> Re-enacted in § 629 of the Revised Statutes.

them from the equity law of England. At the time when the Constitution was formed, this distinction between law and equity, as known in the country from which our ancestors came, was recognized by the Constitution; and the courts of the United States have uniformly held that the rules of decision in equity cases were the same in all the States, and they are the equity law which we derive from England. In the case of *Neves v. Scott*, 13 Howard, 272, there is a passage which I will read to you (and the authorities are there cited also) which expresses this doctrine.

The counsel for one of the parties, in arguing this case, produced a decision of the Supreme Court of the State of Georgia, made between the same parties concerning the same subject-matter, but which was not binding as a bar, and could not be pleaded as a bar, for technical reasons, which it is unnecessary to advert to now; and they insisted — the question arose between citizens of the State of Georgia and citizens of some other State, and the contract in question, a marriage contract, was made in Georgia — that the decision of the highest court of that State was binding as a precedent; but the Supreme Court decided otherwise. They first state the nature of the questions, and show that the questions were questions of trust, — of the extent and nature of the trust declared by the marriage settlement, — and that they belonged to general jurisprudence, and not to the law of Georgia any more than to the law of England or any other State; and then they proceed in this way: —

“Such being the nature of the questions, we do



not consider this court bound by the decision of the Supreme Court of Georgia. The Constitution provides that the judicial power of the United States shall extend to all cases in equity arising between citizens of different States. Congress has duly conferred this power upon all Circuit Courts, and, among others, upon that of the District of Georgia in which this bill was filed, and the same power is granted by the Constitution to this court as an appellate tribunal."

Now comes the principle which it is desirable you should bear in mind:—

"Wherever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them to each particular case as they may find justly applicable thereto. These principles may make part of the law of a State, or they may have been modified by its legislation or usages; or they may never have existed in its jurisprudence. Instances of each kind may now be found in the several States. But in all the States the equity law recognized by the Constitution and by acts of Congress, and modified by the latter, is administered by the courts of the United States, and, upon appeal, by this court."

That is, it is one uniform system throughout the whole United States, — the same in Massachusetts as in Georgia or California; and, in general, the sources of that law are to be found, first, in the decisions of the Supreme Court of the United

States; second, in the decisions of the Circuit Courts as reported in the reports of the Circuit Courts; and lastly, and perhaps I ought to say mainly, in the equity law of England, to which, as you know, you have constant reference in studying this subject; and whatever may have been the modifications made of the English equity law in the different States by statute or by custom, they have no effect in the courts of the United States.

Another department of jurisdiction, as you know, is the admiralty law. It is administered on appeal in the Circuit Courts<sup>1</sup> of the United States, but not by any original jurisdiction except to some small extent, — nothing sufficient to be noticed. In some things arising out of the slave-trade they have an original jurisdiction, but it is of no importance in practice. The original jurisdiction in admiralty cases may be said to be exclusively in the District Court of the United States; and therefore it is, when I come to speak of that court, that I shall speak of the admiralty jurisprudence and practice and methods of pleading. I might say here in passing, however, that the jurisprudence which is administered both in the District Court, and on appeal in the Circuit Court [of Appeals], is the maritime law of the world. It is not any particular municipal system of law. Of course, it has been modified to some extent by statutes of Congress, which I shall notice when I come to discuss that part of the subject, but the modifications are comparatively unimportant, and affect but a small part of the subject.

<sup>1</sup> [The appeal lies now to the new Circuit Court of Appeals.]

Besides having the necessary rules of decision, which are commonly termed the jurisprudence, of the court, the court must have rules of pleading and practice in order to bring the subjects of the different suits regularly before the court in a manner to be dealt with and disposed of conveniently and with sufficient certainty. Now, to follow out the same division which I have already indicated, and which is a natural and necessary division, we will begin with the practice and mode of pleading at law; and upon that, before the 1st of June, 1872, it might have been — I suppose would have been — necessary for me to say not a little. But by this Act of the 1st of June, 1872, in its fifth section, Congress has remitted this whole subject to the laws of the States; so that all I can say upon that matter is, that under this Act of the 1st of June, 1872, which is found in 17 Statutes at Large, 197, you must learn what the practice and pleading and the mode of proceeding in the State courts are, and then, according to this law, if it should remain in force, you will know the laws that are applicable in suits in the United States courts. The reason why I intimate a doubt whether this law will be allowed to stand is, that the practice, pleading, and the forms and modes of proceeding in the State courts, in other than equity and admiralty causes, — for it applies only to the common law, — are really not adapted to the courts of the United States. For instance, in the State of Massachusetts we have departed as little from the old modes of proceeding at the common law, both in pleading and practice, as in any State, with some few excep-

tions, where they still retain the common-law modes of proceeding, and far less than they have in most of the States. When a case goes up from the Superior Court in Massachusetts to the Supreme Court, it goes up on the question of a new trial. It does not go on a technical writ of error. The necessities of the two modes of proceeding are totally different; and therefore, in my judgment, even the Massachusetts system would throw things into confusion if it should be applied to carrying cases from a Circuit Court to the Supreme Court of the United States.<sup>1</sup> In some of the other States there is very much more looseness of proceeding, and the difficulties arising out of that looseness would be found, I think, to be insuperable. There is another difficulty in this law, and that is, it says, "the practice, pleadings, and forms and modes of proceeding, in other than equity and admiralty causes, in the Circuit and District Courts of the United States, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State."

"Existing at the time." So that if the legislature of a State should alter, after the 1st of June, 1872, its own forms and modes of proceeding and practice and pleading, according to this law that

<sup>1</sup> [It is held that the Federal Courts are not bound by State statutes in regard to pleading, the effect of which would be to enlarge or restrict the jurisdiction of the Federal Courts. *Mexican Central Railway v. Pinkney*, 149 U. S. 194; *Holt v. Bergevin*, 60 Fed. Rep. 1. So also State statutes permitting equitable defences to actions at law are not followed. *Scott v. Armstrong*, 146 U. S. 499, 512.]

would go into effect in the courts of the United States, whatever alterations the State legislatures might make. Now, the State legislatures have not, under the Constitution of the United States, any power to legislate respecting the practice, pleading, and modes of proceeding of the courts of the United States. They are entirely removed from their authority; and it is perfectly clear that Congress cannot confer on the legislatures of the States any authority to legislate for the United States courts. There is a case in 12 Howard, 361,<sup>1</sup> where that subject came under the consideration of the Supreme Court, and it was held that Congress could not confer on a State legislature any power to make laws on a subject which was committed to Congress exclusively; and it is committed to Congress to make laws for the practice of its own courts. That seems to me to be a great defect in this law. And that, and the practical difficulty which I have pointed out, I should think, would be likely to lead to a modification of it. The reason, I understand, why it was passed, — at least, the reason assigned by the gentleman who had most to do with its passage, — was, that the practice of the courts of the United States was a sealed book to all young men, — to those who were trying to enter the profession, and to do their duty in it. Well, as I stated to you at the commencement of these Lectures, that was true; and so are all other books sealed until they are opened. The only way is to open them, and find out what is in them. It is, in other words, an attempt to make things easy;

<sup>1</sup> [*The United States v. Reid.*]

but in making them easy, I think, great confusion will be likely to be introduced.<sup>1</sup>

In reference to the practice in equity, the Act of August 23, 1842, found in 5 Statutes at Large, 517, authorizes the Supreme Court to make rules for the practice in equity.<sup>2</sup> Under that authority, a body of rules has been made by the Supreme Court, and the practice of the Circuit Court is conducted in conformity with those rules. And the ninetieth rule makes provision that, if the preceding rules are found insufficient to govern a particular case or question which arises, the court will follow, as nearly as may be, the practice in the High Court of Chancery in England. So in looking into these rules, which are printed under the authority of the court, and are to be found in Mr. Phillips's recent book on the practice of the Supreme Court,<sup>3</sup> if you

<sup>1</sup> The fifth section of the Act of June 1, 1872, is re-enacted in § 914 of the Revised Statutes. [This statute has been construed strictly. Thus it is held that the words "as near as may be" do not mean "as near as possible." *Indianapolis, &c. R. R. Co. v. Horst*, 93 U. S. 291, 301; *Osborne v. City of Detroit*, 28 Fed. Rep. 385. It is held also that mere usage in matters of pleading in a State court, which is fixed neither by a State statute nor by a rule of the court, need not be followed in the Federal Courts. *Osborne v. City of Detroit*, *supra*. The Federal Courts will construe for themselves State statutes in regard to pleading: they are not bound by decisions relating to them made by the State Courts. See *Erstein v. Rothschild*, 22 Fed. Rep. 61, 64. Finally, motions for a new trial, and bills of exceptions are not "pleadings," and consequently are not included by the Statute. *Missouri Pacific Ry. Co. v. Chicago & Alton R. R. Co.*, 132 U. S. 191. See, generally, *Union Pacific Ry. Co. v. Botsford*, 141 U. S. 250, 256; *Lincoln v. Power*, 151 U. S. 436; *Smale v. Mitchell*, 143 U. S. 99.]

<sup>2</sup> § 917 of the Revised Statutes repeats the provisions of the Act of August 23, 1842.

<sup>3</sup> [The present rules will be found in Foster's Federal Practice, and in Desty's Federal Procedure.]

should find a case which was not within them, you must resort to the practice of the High Court of Chancery in England which you will find exhibited in Mr. Daniell's book, and in other books on that subject.

There are one or two points which I should like to call your attention to before the termination of this Lecture, which are of a special character, and which do not seem to fall under any general head. I think you will agree with me when I say that this whole subject is one which cannot be reduced to any scientific, or scarcely to any logical form. It is special, and depends, so to speak, upon many contingencies which grow out of the peculiar relations of the State governments and the United States government. It is fragmentary and irregular in its character. I have endeavored, as well as I could, to reduce it to a logical form, but there are two or three special things which I ought to mention before quitting this part of the subject.

There is an Act of March 3, 1865, found in 13 Statutes at Large, 501, § 4, which authorizes the judges to try the facts in a common-law case with the consent of the parties; and this authority has been found to be of considerable importance in practice.<sup>1</sup>

The seventeenth section of the Judiciary Act, 1 Statutes at Large, 83, authorizes the Circuit Courts of the United States to grant new trials where, according to the rules of the common law, they

<sup>1</sup> This provision is continued by § 649 of the Revised Statutes. [It does not apply to trials in the District Court. *Wear v. Mayer*, 6 Fed. Rep. 658.]

should be granted.<sup>1</sup> But I ought to mention in connection with that, that the refusal of the Circuit Court to grant a new trial is no ground for a writ of error; because the application for a new trial is an appeal to the discretion of the court. A new trial may be granted or may be refused, not in accordance with the strict principles of law, but because the court finds, or is satisfied, that justice has or has not been done in the case; whereas on a writ of error the court can decide only in conformity with strict principles of law. If the record shows they have been administered in the court below, then the judgment is to be affirmed; if they have not been administered, the judgment is to be reversed; although the court may be of opinion, perhaps, that strict justice was done, or was not done, in a particular case. In the one class of cases it is simply a question of strict law; into the other an element of discretion enters, and therefore it is held there is no writ of error upon the refusal of a new trial, or for granting a new trial.

The courts of the United States have no power to grant a motion for a nonsuit. They must submit every common-law case to a jury. But then that is rather a matter of form, because they have power, when the plaintiff has exhibited all his evidence, to receive a motion to instruct the jury that the evidence will not warrant the jury in finding a verdict in favor of the plaintiff; it being considered by the Supreme Court to be a question of law whether all the evidence exhibited will warrant the

<sup>1</sup> Repeated in § 726 of the Revised Statutes. [See *Ives v. Grand Trunk Ry. Co.*, 35 Fed. Rep. 176.]



jury in finding a verdict for the plaintiff, and if the judge gives or refuses that instruction, it is ground for a writ of error. But then it must be borne in mind, that if there is any evidence exhibited by the plaintiff which would or might, in the judgment of the jury, tend to support the claim of the plaintiff, — any evidence, no matter whether the judge would find that to be sufficient or not, — he must submit it to the jury; so that the only case in which a judge can instruct a jury that the evidence exhibited does not warrant them in finding a verdict for the plaintiff is the same case where he would order a nonsuit. It is therefore merely a different mode of proceeding, arising out of some conception which the early judges had, that the Constitution having provided for a trial by jury in all cases at common law, the jury must somehow pass upon the question under such an instruction as I have spoken of; and if they find a verdict for the plaintiff contrary to the instruction, the judge is bound to set it aside, and he has power to set it aside. If the jury are found to be contumacious to that extent, the judge would take the matter into his own hands, and set the verdict aside, and order a new trial with the expectation of finding a jury that would be reasonable.

You will find this subject discussed, and it is worth your while to look at the case, in 10 Wallace, 655.<sup>1</sup> I have referred you there to a dissenting opinion, but whether the dissent was right or wrong is of no consequence. The authorities that are there

<sup>1</sup> *Merchants' Bank v. State Bank.*

cited upon this subject are unquestionably correct. If you look at page 655, you will find a collection by the judge of the authorities upon the question, what is meant by no evidence which would warrant a verdict, — whether a mere scintilla of evidence would warrant a verdict, or whether it must be something that a reasonable man could regard and be governed by.

It often becomes a matter of great importance to stay an execution, as you may readily suppose. If a judgment has been obtained in a Circuit Court of the United States, the plaintiff has a right to an execution, and to obtain his money or his other satisfaction, whatever it may be; but if it is a case where there may be a writ of error or an appeal, then it is reasonable, and is provided for by law, that, on giving proper security, the plaintiff in error or the appellant shall be enabled to supersede that judgment temporarily, until the higher court can pass upon the question, and say whether it is correct or erroneous. This subject is provided for by the twenty-third section of the Judiciary Act, which provides that, within ten days after the judgment is rendered, the necessary steps should be taken to supersede the execution, and the principal step is to give security to prosecute the appeal or the writ of error, and to abide by the judgment of the court above. This time of ten days was enlarged by the Act of June 1, 1872, in its eleventh section, to sixty days; so that now opportunity is given to the defendant or plaintiff, where there is a judgment against him, to stay the execution by giving the necessary security, and taking the other

necessary steps, at any time within sixty days of the rendition of the judgment.<sup>1</sup>

#### THE EXISTENCE OF STATE STATUTES, WHEN DISPUTED.

A QUESTION may arise in a court of the United States, and has arisen, whether a State statute, pleaded or cited as a law of the State, actually exists. This is a judicial question, to be determined by the court, without the intervention of a jury, although it may in form arise as a question of fact. The question of the existence of a statute is, like the construction of an admitted statute, a question of what the law of the State is on a particular subject; and the rule which is followed in the Supreme Court of the United States is to adopt the decision of the State court on the existence of the statute, when the State court has passed upon it. Thus, where the Constitution of the State of Illinois made it necessary to the validity of a statute that the legislative journals should show that it was passed by a majority of all the members elect in each house of the General Assembly, and the Supreme Court of the State had held that under it a supposed statute had never been constitutionally enacted, the Supreme Court of the United States held in conformity with the State decision. And it was also said that, if the State court had not passed upon the validity of the statute, it would have been the duty of a court of the United States to give the same construction and effect to the Constitution of Illinois, because, in the absence of a decision by the State court, the Federal Courts are bound to take judicial notice of the provisions of a State constitution. *Town of South Ottawa v. Perkins*, 94 U. S. 260.

[So the decision of the highest court of a State as to the legality or illegality of an inferior State tribunal will be followed by the Federal Courts. *Norton v. Shelby County*, 118 U. S. 425, 439; *Meriwether v. Muhlenburg County Court*, 120 U. S. 354.]

<sup>1</sup> See § 1007 of the Revised Statutes. [See also *Kitchen v. Randolph*, 93 U. S. 86.]

## CHAPTER IX.

PROCEDURE AND PRACTICE (*continued*).

IN the last Lecture, gentlemen, I brought before you, for consideration, the rules of law by which the courts of the United States are governed in exercising their jurisdiction upon certain subjects. I now advance to other subjects which it is necessary they should find rules of law to govern. And the first subject to which I ask your attention, under this head, is that of evidence. What are the rules of evidence which govern the Circuit Courts in trials either at law, or in equity, or admiralty? The original rule, so far as regards trials at law, was prescribed by that thirty-fourth section of the Judiciary Act to which I have had occasion several times to ask your attention, as follows:—

“The laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.”

And it has been held, although it is not necessary for me to refer you to the decisions, — it has been held by the Supreme Court of the United

States, as well as repeatedly on the circuits, that this applied to, and included, rules of evidence, as well as other rules of decision; so that, under this section, the laws of the States concerning evidence were the laws of the courts of the United States.<sup>1</sup> And that remains true to this time, except so far as those rules of evidence, prescribed by State laws, have been modified by acts of Congress; and to those acts of Congress, or what amounts to the same thing, to the rules made by the Supreme Court under the authority of acts of Congress, I will now ask your attention.

The first question which arose was, whether these State laws apply in equity and admiralty, as well as in trials at common law. And it was held they did not; and therefore the English rules of evidence in equity, and the rules in admiralty which are derived either from England or from a wider survey of admiralty law, were those which were practised on in equity and admiralty in the courts of the United States down to the time when Congress passed an act found in 12 Statutes at Large, 588. It is a short act, and I will read it. The date of it (and perhaps it would be well for you to observe the date) is the 16th of July, 1862.

“The laws of the State in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law [it was so before at common law], in equity, and admiralty.”

So that, by this statute, the same rules were to

<sup>1</sup> *Connecticut Mutual Life Insurance Co. v. Union Trust Co.*, 112 U. S. 250.

be applied in equity and admiralty as at the common law, so far as regarded the competency of witnesses.

But Congress apparently was not satisfied to have the laws of the State, as to the competency of witnesses, continue to be applied; and therefore, in 13 Statutes at Large, 351, § 3, they passed another act which, curiously enough, you will find is a clause in an appropriation bill, and it has no connection whatever with what goes before or what comes after. It is a proviso to a section in an appropriation bill, in regard to the appropriation of the sum of one hundred thousand dollars for the trial and punishment of persons engaged in counterfeiting treasury notes: "*Provided*, That, in the courts of the United States, there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in, the issue tried."

That swept away, absolutely and entirely, all objections to witnesses, either because they had an interest in the subject, an interest in the question to be tried, or because they were parties to the suit. That was very hasty legislation, undoubtedly, as you might infer from the place where you find it; and Congress was obliged, afterwards, to modify it, which they did in the same book, 13 Statutes at Large, 533:—

"That the third section of an act, entitled 'An act making appropriations for sundry civil expenses of the government,' etc., be, and the same hereby is, amended by adding thereto the following proviso: *Provided*, further, That in actions by or

against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."

This was intended to protect those who were in interest behind executors, administrators, or guardians from testimony given by surviving parties when the real opposing party was deceased, or when he was so removed from the controversy that he could not be expected to testify as a witness. And, therefore, it makes this very proper provision: "That neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to do so by the opposite party or required to do so by the court." Precisely what is meant by being "required to do so by the court," it is difficult to see. There was a case<sup>1</sup> in this Circuit before Mr. Justice Clifford and Judge Lowell, some years ago, of very great interest and magnitude, in which they held, that they would not make an order to examine a plaintiff in equity respecting any transactions with a deceased person, except in conformity to the laws of the State, — that they would follow these. And in that case they excluded the evidence; and that exclusion was fatal to the plaintiff's claim, because she had no evidence, except her own, as to the material point

<sup>1</sup> [*Robinson v. Mandell*, 3 Cliff. 169. See also *Eslava v. Mazange*, 1 Woods, 623; *Mumm v. Owens*, 2 Dill. 475.]

involved in the case, which depended upon her conversations and agreements with her deceased aunt. Whether that decision will be followed — whether the analogy between the State laws and the orders which the court may make in its discretion, if it has discretionary authority — is a subject on which I have no opinion.

Now, that is the present state of the law as to the competency of witnesses. Parties in civil cases are competent in the courts of the United States, as witnesses, to every subject and on every topic in which they could be witnesses if they were disinterested, except conversations and transactions with a deceased person, or with a ward who is represented by a guardian.<sup>1</sup>

The fifth section of the present Practice Act, which I have so frequently referred to, although it adopts the laws of the State as to practice, pleadings, and forms and modes of proceeding, in other than equity and admiralty causes, in the Circuit and District Courts of the United States, has a proviso, "That nothing herein contained shall alter the rules of evidence, under the laws of the United States, and as practised in the courts thereof." So that these acts of Congress, to which I have referred you, give the present law as to the competency of witnesses.<sup>2</sup>

<sup>1</sup> See § 858 of the Revised Statutes, in which the statutes above cited have been consolidated. [For the construction of this section, see *Life Insurance Co. v. Schaefer*, 94 U. S. 457; *Connecticut Mutual Life Insurance Co. v. Union Trust Co.*, 112 U. S. 255; *Texas v. Chiles*, 21 Wall. 488; *Dravo v. Fabel*, 25 Fed. Rep. 116; *Witters v. Sowles*, 28 Fed. Rep. 218.]

<sup>2</sup> Section 5 of the Practice Act of 1872 is re-enacted in § 914 of the Revised Statutes, with the omission of the proviso.



It is material to observe what means are provided by Congress to compel witnesses to testify. In the Act of March 2, 1793, found in 1 Statutes at Large, 335, it is provided: —

“Subpœnas for witnesses, who may be required to attend a court of the United States in any district thereof, may run into any other district; provided, that, in civil causes [it is limited, you perceive, to civil causes, — in criminal causes it may run anywhere], the witnesses living out of the district in which the court is holden do not live at a greater distance than one hundred miles from the place of holding the same.”<sup>1</sup>

So that subpœnas are issued by the clerks of the Circuit and District Courts to compel witnesses to attend from any part of the district in which the court is held, and from any other district, provided the witness is not required to travel more than one hundred miles.<sup>2</sup>

In other respects than those which I have noticed, you may consider that the laws of the State in respect to evidence govern in courts of the United States. There are some small differences in their practice, — so small that it is hardly worth while to notice them.

There is one, however, of considerable importance. Generally, in the practice of the State courts, it is admissible to cross-examine a witness

<sup>1</sup> [Revised Statutes, § 876.]

<sup>2</sup> [A witness who resides more than 100 miles from the place of trial, although within the district in which the court sits, cannot be brought in by subpœna. *Henry v. Ricketts*, 1 Cranch C. C. 580. As to the manner in which the distance is determined, see *Ex parte Beebees*, 2 Wall. Jr. 127; *United States v. Ralston*, 17 Fed. Rep. 895.]

on any subject which is pertinent to the issue, whether he was examined in chief on that topic or not; but it was settled a great while ago, by the Supreme Court, that the strict English practice in respect to cross-examination prevailed in the Federal Courts; that a witness could be cross-examined only upon subjects on which he was examined in chief, and if the opposite party desired to examine him on other independent topics, although relevant to the issue on trial, he must call him as his witness and examine him in chief; and that has been the practice, so far as my personal knowledge extends, in all the courts of the United States. Whether this recent act, which provided that the practice, pleadings, forms, and modes of proceeding shall conform to the laws of the States, would reach that, perhaps may be doubtful; but my own impression is that it does not, because the proviso is, "That nothing herein contained shall alter the rules of evidence under the laws of the United States," and I take the mode of cross-examination of a witness to be one of the rules of evidence, so that, I suppose, it still remains true that, in the courts of the United States, you cannot cross-examine a witness on any topic upon which he was not examined in chief.<sup>1</sup>

The next inquiry is, What is the mode of proof in equity and admiralty? The original provision, found in the thirtieth section of the Judiciary Act, 1 Statutes at Large, 88, is, "That the mode

<sup>1</sup> [This is not now the law. The practice of the particular State is followed in this matter, as in all others. *Spies v. Illinois*, 123 U. S. 131, 180.]

of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law."

But in 1842 Congress passed an act, which is found in 5 Statutes at Large, 518, which authorizes the Supreme Court of the United States to make rules concerning evidence in the courts of the United States. It is a very broad power, not limited at all. It confers upon the Supreme Court of the United States unlimited jurisdiction over the subject of rules of evidence, among other things, in the courts of the United States. And from time to time, since that, the court has made rules on the subject of the mode of proof. It is not necessary to ask your attention to any of the early rules which are superseded; but one was made at the December term, 1861, which you will find published among the rules of practice of the courts of equity in the United States, in which this whole subject is covered; and although this thirtieth section of the Judiciary Act had said that the mode of proof in all the courts should be the same, and that witnesses should be produced and examined in court, under this rule, in equity and admiralty cases the witnesses are to be produced before an examiner, and examined and cross-examined, so that their evidence goes upon the record; and in cases of appeal from the District Court in Admiralty to the Circuit Court,<sup>1</sup> and thence to the Supreme

<sup>1</sup> [The reader will remember that the appellate power of the Circuit Court is now lodged elsewhere.]

Court, in case of an appeal from the Circuit Court to the Supreme Court, or in a case in equity, the evidence all goes up as part of the record; and the questions of fact as much as the questions of law are reconsidered by the appellate court. It is not necessary for me to read this rule. It covers the whole subject, — provides for compelling the attendance of witnesses, for the mode of their examination, and for the manner in which the testimony, when obtained, shall be brought on to the record for the consideration of the court. Some difference of opinion has existed, from time to time, upon the subject of the power of the court to make a rule as broad as this, but I think it is quite safe to assume that their action, in that particular, will not be disturbed.<sup>1</sup>

There is one provision in this thirtieth section which is still occasionally practised upon, and which is not repealed, as I understand it, by the rule of which I have been speaking. It is that provision by which a party on a trial in a District Court, in an admiralty case, suggests to the judge that a particular witness, or more than one, if the fact be so, is about to go out of the country, or out of the jurisdiction of the court, or for some cause or other may not be present; so that, if the case should be appealed, he cannot appear and testify; and thereupon the judge is authorized to appoint somebody, the clerk being the proper person, to

<sup>1</sup> As the law now stands, the power of the Supreme Court to fix by rules the mode of proof in equity and admiralty cases is confirmed by § 862 of the Revised Statutes, excepting as provided in the sections following. See §§ 863 *et seq.*

take down his evidence; and that evidence has the same effect in the appellate court as if it was given by deposition out of court. It has become of comparatively little consequence since this rule was made; but I can remember when it was not an infrequent practice to have testimony taken in that way.<sup>1</sup>

Of course, the laws of the United States upon the subject of evidence would be very incomplete, if provision were not made for taking depositions as well in trials at law as in equity and admiralty.

The provisions which have been made in equity and admiralty I have already adverted to; but there are two kinds of depositions which may be taken and used in trials at law. The first is under this thirtieth section of the Judiciary Act, and I will read enough of it to bring before you the idea which I wish to convey.

“When the testimony of any person shall be necessary in any civil cause depending in any district in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of such person may be taken *de bene esse*,” in the

<sup>1</sup> See Revised Statutes, § 863. [Depositions may be taken by a United States Commissioner, Notary Public, Clerk of the Circuit or District Court, or Judge of a County Court; or, according to a rule of the court, by any person whom the court appoints as “special examiner,” for the particular case.]

manner pointed out; that is, it may be taken for the occasion, and if the supposed cause of his inability to attend should continue until the day of the trial, then his deposition may be read. But it is only conditionally taken; and if the cause which led to its taking is removed before the time of the trial, then the witness, and not the deposition, must be produced.<sup>1</sup>

On the other hand, there is recognized in the section, at the close of it, — though there is no express authority conferred, — there is recognized an authority in the courts of the United States to grant what is here called a *dedimus potestatem*, which we commonly, at the present day, call a commission to take evidence. And it is said here, that nothing herein contained “shall be construed to prevent any court from granting a *dedimus potestatem* to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice.”<sup>2</sup>

Now the Supreme Court has decided, in the case of *Sargent v. Biddle*, 4 Wheaton, 508, that these two classes of depositions — those taken *de bene esse* under the thirtieth section, and those taken under a commission — are wholly distinct; and though it is necessary that the cause which induced the taking of the deposition *de bene esse* must continue down to the time of the trial, and be then existing, otherwise the witness must be produced, that is not true of depositions taken under a com-

<sup>1</sup> See §§ 863-865 of the Revised Statutes.

<sup>2</sup> Power to grant a *dedimus potestatem*, or commission to take testimony, is now expressly given by § 866 of the Revised Statutes.

mission. They are considered to be absolute instead of *de bene esse*, and when once taken they are returned into court and opened there, according to the rules of the court; and the party that takes them may rely upon his right to use them. In this thirtieth section there is a provision requiring notice, in certain cases, to the opposite party, of the taking of the deposition, so that he may attend and cross-examine the witness; but it was only in certain cases, and notice was dispensed with in a large class of cases. This has always been considered, I believe, by judges and practitioners, to be a defect in the law, because *ex parte* evidence is of very little value. And, accordingly, Congress, in 1872, May 9th, passed an act which is found in 17 Statutes at Large, 89, by which they prohibited any deposition from being taken without notice to the opposite party, except under very special circumstances. They require everything to be done which can practically be done to give notice. That is an important modification of this thirtieth section of the Judiciary Act as it had existed for so many years.<sup>1</sup>

In reference to the mode of proceeding in taking depositions, in certifying them, and in returning and opening them in court, there have been great numbers of decisions. It would not be practicable, within the limits which I must prescribe to myself, to ask your attention to those decisions. You will readily be able to recur to them. They are found in any good digest down to the time when that digest was made. And, in practice, when any

<sup>1</sup> As to notice, see § 863 of the Revised Statutes.

question arises in your mind as to whether a deposition which has been taken is or is not admissible in evidence, it would be necessary to look into this thirtieth section and see what its requirements are, and then to look into the decisions which have been made under the different parts of it, and see whether those requirements have been complied with.<sup>1</sup>

There is another authority which the Circuit Courts have, in trials at law, to compel discovery, which is somewhat unlike the modes of proceeding in other courts of common law. It is found in the fifteenth section of the Judiciary Act, 1 Statutes at Large, 82: "That all the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery."<sup>2</sup>

It confers on the courts of the United States the power to compel discovery in a suit at law; and that has been found, in practice, of very considerable utility. One evidence of it is the number of decisions that have been made defining the limits

<sup>1</sup> Consult Revised Statutes, §§ 863-865. [See also Notes on the Revised Statutes by Gould & Tucker, and 1 Foster's Federal Practice, pp. 502 *et seq.*]

<sup>2</sup> See § 724 of the Revised Statutes. [See *Merchants' Bank v. State Bank*, 3 Cliff. 201; *Lowenstein v. Carey*, 12 Fed. Rep. 811; *Brewster v. Tuthill Spring Co.*, 34 Fed. Rep. 769.]



of this power, and the circumstances under which it should be exerted. And if you will turn to Abbott's National Digest, Vol. II. p. 161, you will find, as I know from personal examination, all the decisions under this section of the act. I think he calls the present digest, of which he has published two volumes, the "National Digest," and the other is called the "Digest of the Decisions of the Courts of the United States," in four volumes. I presume it is in your library here.

Before leaving the subject of the Circuit Courts, I ought to say something in regard to their criminal procedure.

It is very remarkable, certainly, that, down to the year 1865, there was no act of Congress regulating the subject of grand juries, or their formation, or in any way regulating them in the courts of the United States. On the 3d of March, 1865, found in 13 Statutes at Large, 500, § 1, grand juries in the courts of the United States were regulated. And in § 2 the subject of challenges to the traverse jurors was also regulated. And it was there provided that in capital cases the accused should have the right to use twenty challenges, and the United States five; that, in cases other than capital, the accused should have the right to use ten challenges, and the United States two. But this was amended by the act passed on the 8th of June, 1872, found in 17 Statutes at Large, 282, § 2; and this provided that, in cases of treason and murder, the challenges should be as before, that is, twenty for the accused, and five for the United States; and in felonies, ten for the accused, and

three for the United States; and in all other cases under the degree of felony, three for each party.

That is the present law. In cases of treason or murder, twenty and five. In felony, ten and three. In trials under the degree of felony, each party, the United States and the accused, three.<sup>1</sup>

There is another provision of an Act of Congress of some practical importance; and that is, that crimes begun in one district and completed in another may be tried in either.<sup>2</sup>

This was enacted in 14 Statutes at Large, 484, § 30, and probably grew out of some public want arising out of the administration of the internal revenue laws, and perhaps, more especially, the laws in regard to distilleries. But still it was a very proper provision of law, and one which I had myself once seen occasion to regret the absence of.

The subject of criminal pleadings is touched upon in a very important way by this recent Act of June 1, 1872, in §§ 8, 9, and 10:—

“That no indictment found and presented by a grand jury in any District, or Circuit, or other court of the United States, shall be deemed insuffi-

<sup>1</sup> Revised Statutes, §§ 800–822. [The defendant in a capital case is entitled to receive, at least two days before the trial, a copy of the indictment and a list of the witnesses to be produced against him. Rev. Stat., Sec. 1033. See *Logan v. United States*, 144 U. S. 263, 304.]

<sup>2</sup> Revised Statutes, § 731. [A crime committed by means of a letter sent by post, such as a letter proposing an illegal contract or making false representations, is usually held to be committed in the district in which the letter is received. See *In re Palliser*, 136 U. S. 257, where the cases are discussed. In case of a libel sent by post, the crime is committed only in the district where the libel is received. *Re Buell*, 3 Dillon, 116, 123.]

cient, nor shall a trial, judgment, or other proceeding thereon, be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.”<sup>1</sup>

I am unable to tell you what that means, — “matter of form only, which shall not tend to the prejudice of the defendant.” It remains to be seen what kind of defects those are. A defect known to the common law, recognized as such, and yet a “matter of form only, which does not tend to the prejudice of the defendant.” I call your attention to it to say to you, if this law should not be repealed, if you have occasion to take exceptions to an indictment, you will then be called upon to consider what it does mean.<sup>2</sup>

Section 9 is:—

“That in all criminal cases the defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged, provided that such attempt is by itself a separate offence.”<sup>3</sup>

The first part of this provision is a rule of criminal pleading which has obtained in many of

<sup>1</sup> [Revised Statutes, § 1025.]

<sup>2</sup> [This law, as Judge Curtis anticipated, has given rise to much litigation. In the following cases the indictment was sustained: *United States v. Jackson*, 2 Fed. Rep. 502; *United States v. Bornemann*, 35 Fed. Rep. 824; *United States v. Simmons*, 96 U. S. 36. In the following cases the indictment was held to be defective: *United States v. Morrissey*, 32 Fed. Rep. 147; *United States v. Slenker*, 32 Fed. Rep. 691; *United States v. Davis*, 6 Fed. Rep. 682; *Moore v. United States*, 160 U. S. 268; *Markham v. United States*, 160 U. S. 319.]

<sup>3</sup> [Revised Statutes, § 1035.]

the States; and I know of no objection to it. He "may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged in the indictment, or he may be found guilty of an attempt to commit the offence so charged." I do not see any objection to that, if it is known beforehand, as matter of law, that the charge that he did the thing is also a charge that he attempted to do it. He seems to have sufficient notice, and I see no objection to it if it is a separate offence, as this section provides.

"If the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause, as to the other defendants, may be tried by another jury."<sup>1</sup>

This, also, is a rule which has obtained very generally, and I can see no objection to it.

It was early settled that the section of the Judiciary Act which makes the laws of the several States the rules of decision in trials at common law, applied only to civil actions, and not to criminal trials; and the question arose in the case of *The United States v. Reid*, reported in 12 Howard, 361, what was the law of evidence *in criminal cases*, and it was held, by the Supreme Court, that it was that law of the State which existed at the time when the Constitution was adopted in 1789; that subsequent modifications of the State law had not affected the rules of decision in the courts of the

<sup>1</sup> Revised Statutes, § 1036. [And so also they may find some guilty, and disagree as to others. *Bucklin v. United States*, (No. 2.) 159 U. S. 682.]

United States in criminal cases. Now this decision, so far as it goes, is satisfactory and sufficient; but it applies only to those thirteen States which came into the Union at the time of the formation of the Constitution, — or, in truth, to but eleven, which came in when the Constitution went into operation, though they have usually been called the thirteen States. It does not apply to any that have come in since; and I am unable to tell you what the rules of evidence in criminal trials are, other than the rules of the State where the trial is had, and within whose limits the trial is had. Certainly it is so in all the original States, and although there has been no decision going beyond that, some of the considerations which led to that decision in the case of *The United States v. Reid* would be applicable even to States admitted into the Union since that trial; and I should suppose the safer rule would be to consider that, in criminal trials, you are to look to the laws of the State, except so far as you find they have been modified in any way by acts of Congress, — which, in reference to criminal trials, they have not, except by that provision that a witness should not be excluded on account of color.<sup>1</sup>

You are aware that, in States where slavery existed, a man of color, whether he was a slave or freeman, was not competent to testify against a white man. That is abolished by the provision which I read to you, that in all trials that should be no objection. That applies to criminal trials as well as to others.

The next topic to which I ask your attention,

<sup>1</sup> See Revised Statutes, § 722.

and which I hope to be able to finish this afternoon, is the concurrent jurisdiction of the State courts and the United States courts. Here are these different courts, held within the same territory, administering, to a very great extent, the same system of laws, and it is a very interesting and important inquiry how far they have concurrent jurisdiction. In the first place, you may take it, I think, as clear, that it is not enough to exclude the concurrent jurisdiction of State courts that cases come under the judicial power of the United States. The Constitution has conferred on the national judiciary jurisdiction over certain classes of cases dependent, first, on the character of the parties, and, second, on the subject-matter involved in the suit. Now, the mere fact that the Constitution has conferred this jurisdiction over these different classes of cases on the courts of the United States, is not enough to exclude the State courts. There must be something more than that. In other words, it is not enough to show that a court of the United States has jurisdiction to defeat the jurisdiction of the proper State court. You must go further, and inquire whether either the Constitution itself, in the terms in which it has conveyed the jurisdiction to a particular court, or whether Congress, acting under the Constitution, has excluded the State courts from the exercise of judicial power over a class of cases.

Now, I propose to ask your attention, in the first place, to what the Constitution has done in regard to excluding the jurisdiction of State courts. In the third article, in the passage which I have several times read to you, occurs this language:—

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction."

"In all cases." Well, according to the literal meaning of that language, if they have original jurisdiction in all cases affecting public ministers and consuls, or those in which a State shall be a party, no other court can have any original jurisdiction, because, if any other court had original jurisdiction, then the Supreme Court would not have original jurisdiction in all cases; and this has given rise to very much doubt, which is not at this time settled.<sup>1</sup> Perhaps the best mode I can adopt to bring before you the present state of the law is to read a short passage from Kent's Commentaries, Vol. I. p. 315: "The Judiciary Act of 1789 seems to have considered it to be competent for Congress to vest concurrent jurisdiction in those specified cases in other courts; for it gave a concurrent jurisdiction, in some of those cases, to the Circuit Courts. In the case of *The United States v. Ravara* (2 Dallas, 297), this point arose in the Circuit Court for Pennsylvania District, and it was held that Congress could vest a concurrent jurisdiction in other courts of those very cases over which the Supreme Court had original jurisdiction, and that the word 'original' was not to be taken to imply exclusive cognizance of the cases enumerated. But the opinion of the Supreme Court of the United States in *Marbury v. Madison* (1 Cranch,

<sup>1</sup> [It has now been held that the expression "all cases" does not make the jurisdiction exclusive. *Clayton v. Houseman*, 93 U. S. 130.]

137), goes far towards establishing the principle of exclusive jurisdiction in the Supreme Court in all those cases of original jurisdiction. This last case was considered in *Pennsylvania v. Kosloff* (5 S. & R. 545) as shaking the decision in the case of *Ravara*; and yet the question was still left in doubt by the Supreme Court, in the case of *The United States v. Ortega* (11 Wheat. 467), and the decision upon it was purposely waived."

I desire also to refer you to the decision of Mr. Justice Nelson in the case of *Graham v. Stucken*, 4 Blatchford, 50, and to some remarks of Mr. G. T. Curtis in 1 Curtis's Commentaries, §§ 108, 109. I think it should be said that this is an unsettled question, as it was left by the Supreme Court of the United States in *The United States v. Ortega*. Whether Congress can constitutionally do what it has attempted to do, — confer some part of the jurisdiction which by the Constitution it was said the Supreme Court of the United States should have in all cases, — is, I think, an unsettled question. My own opinion about it is, that the reasoning of the court in *Marbury v. Madison* would show they cannot; but that is certainly a subject of doubt.<sup>1</sup>

The particular section is the thirteenth of the Judiciary Act, which says: "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or

<sup>1</sup> [The Supreme Court have since decided that Congress has this power. See p. 9, *supra*.]



aliens, in which latter case it shall have original, but not exclusive jurisdiction."

Then it goes on to the other part of the subject, about ambassadors, etc., and confers a portion of the jurisdiction upon inferior courts, — Circuit and District Courts. The eleventh section of this act respects the jurisdiction of the Circuit Court, and expressly makes the jurisdiction of the State courts so far as Congress could, concurrent with that of the Circuit Courts:—

"Circuit Courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity."

The ninth section respects the jurisdiction of the District Court, and gives that court, exclusive of the jurisdiction of the State courts, the power to entertain suits concerning consuls and vice-consuls. You will find a decision in *Davis v. Packard*, 7 Peters, 281, where the Supreme Court of the United States decided that a State Court could not entertain a suit against a vice-consul.<sup>1</sup> They have also decided, in *Gelston v. Hoyt*, 3 Wheaton, 246, that a State court cannot entertain jurisdiction over a question of forfeiture under a law of the United States. They have also decided, in the case of *The Belfast*, 7 Wallace, 624, that the State cannot entertain jurisdiction, even though expressly authorized by State statute, over maritime liens, — liens created by the maritime law; but that the entire

<sup>1</sup> [Rev. Stat. § 711, clause 8, which made this jurisdiction exclusive of the State courts, was repealed by Act of February 18, 1875 (18 St. 318).]

subject of maritime liens belongs to the District Courts of the United States.<sup>1</sup> They have settled, however, that, although a mariner has a lien upon a vessel for his wages, and if he pursues that remedy by means of the lien, he must go into the District Court, nevertheless, the courts of the several States have jurisdiction in actions at common law for the recovery of mariners' wages. So that the distinction is between a suit founded on a contract, whether for mariners' wages or anything else, where the State courts have jurisdiction, and a suit founded upon a maritime lien, where, as the Supreme Court holds, they have no jurisdiction. That is pointed out in *Leon v. Galceran*, 11 Wallace, 185.

They have also said that, although the States cannot by their statutes create maritime liens, nor give the courts of the States jurisdiction to enforce such liens, they may create liens which will attach upon a vessel. There is no maritime lien, no lien created by the maritime law, upon a vessel for supplies or repairs in a home port; but if the legislature of a State chooses to create such a lien, — and they almost universally have, I think, — that is within their competency, and they may also give jurisdiction to these courts to enforce those liens, but they are not maritime liens. They are no more maritime liens than liens upon houses or warehouses in favor of the builder or contractor.<sup>2</sup>

<sup>1</sup> [See *Stewart v. Potomac Ferry Co.*, 12 Fed. Rep. 296.]

<sup>2</sup> For the cases in which the jurisdiction of the Federal courts is expressly made exclusive of that of the State courts, see Revised Statutes, § 711.

It has also been held from an early day, and ever since, that a State court cannot issue a writ of mandamus to an officer of the United States. This was decided originally in the case of *McClung v. Silliman*, 6 Wheaton, 598. Nor can a State court issue a writ of replevin to take property out of the hands of a marshal, which he holds either by virtue of an attachment or in any other official way, as was held in *Freeman v. Howe*, 24 Howard, 450. Nor can a State court issue a writ of *habeas corpus* to take a prisoner either out of the custody of a marshal, or out of the custody even of a State officer in a prison of the State, if he is there under the sentence of a court of the United States, as was held in *Ableman v. Booth*, 21 Howard, 506.<sup>1</sup> Nor can a State court enjoin a judgment of a court of the United States. *McKim v. Voorhies*, 7 Cranch, 279, and *Duncan v. Darst*, 1 Howard, 301.<sup>2</sup> Nor can a State court of insolvency discharge a judgment of a court of the United States, as was decided in the case I last referred to.

The question has often arisen, and been decided differently in different States, whether a court of a State had jurisdiction to try the question of the validity of a patent or copyright. I believe it has been agreed on all hands that they have no jurisdiction to try such a case when directly presented. The real question has been whether they could try that subject-matter when collaterally presented. If a patentee should bring an action in a State court against an infringer, founded upon his patent,

<sup>1</sup> [*Tarble's case*, 13 Wall. 397.]

<sup>2</sup> [See *City Bank of New York v. Skelton*, 2 Blatchf. 14.]

and seeking for damages, it is generally agreed, I believe universally, that a State court cannot entertain such a suit. The reason is because, by the fifty-fifth section of the patent act, found in 16 Statutes at Large, 206, it is provided that, in all suits at law or in equity founded upon patents, the Circuit Courts of the United States shall have cognizance; and in the hundred and sixth section the same provision is made in regard to copyrights.<sup>1</sup> That is found in 16 Statutes at Large, 215. But it will readily occur to you that a great many cases which go into the State courts may be more or less connected with this subject, — the sale of patent rights, for instance. An interest under a patent is sold, and a promissory note is taken, and an action is brought upon the note, and the defendant says the patent was invalid, and the consideration of the note failed. That presents directly, in one sense, the question of the validity of the patent, but it arises only collaterally. The suit is not brought for any such purpose. I think the better opinion is, in such cases, that the State courts have jurisdiction. If you look at the case of *Nash v. Lull*, 102 Mass. 60, you will find that Mr. Justice Gray has there collected the authorities, *pro* and *con*, on this subject; and I think the weight of authority, as well as of reason, is very decidedly that the courts of the several States have jurisdiction to try the question of the validity of a patent or copyright when it arises collaterally.<sup>2</sup>

<sup>1</sup> [See § 711 of the Revised Statutes.]

<sup>2</sup> [See also *Rice v. Garnhart*, 34 Wis. 453; *The Continental Store Service Co. v. Clark*, 100 N. Y. 365; *Slemmer's Appeal*, 58 Pa. St. 155; *Williams v. Star Sand Co.*, 35 Fed. Rep. 369, and note.]

Congress has also legislated on the somewhat analogous subject of trade-marks, as will be found if you refer to 16 Statutes at Large, 212; and in the eighty-third section Congress has expressly declared that the fact that Congress has legislated on this subject shall not deprive any party of any remedy in any court; so he may go into a court of a State to obtain a remedy for the violation of his right to his trade-mark, notwithstanding that act, and just as well as he could if the act had never been passed.<sup>1</sup>

I have now finished what I have to say upon the subject of the Circuit Courts, and the concurrent jurisdiction of the State courts.

<sup>1</sup> It has been recently held by the Supreme Court, that the trade-mark laws of the United States, as embodied in §§ 4937 to 4947 of the Revised Statutes, are invalid for want of constitutional power to enact them; that, if Congress can legislate at all for the protection of trade-marks, the legislation must be limited to their use in "commerce with foreign nations, and among the several States, and with the Indian tribes;" and that the present legislation is not so limited. But this leaves untouched the treaty-making power over trade-marks and the duty of Congress to pass laws to carry such treaties into effect. *Trade-Mark Cases*, 100 U. S. 82.

## CHAPTER X.

## THE DISTRICT COURTS.

WHEN the Judiciary Act was adopted, on the 24th of September, 1789, it established thirteen districts. There were then but eleven States, Rhode Island and North Carolina not then having expressed their assent to the Constitution; but what was known as the District of Maine, then a part of the State of Massachusetts, and the District of Kentucky, then a part of the State of Virginia, were erected into separate districts, making, in the whole, thirteen in number. Now, there are fifty-eight<sup>1</sup> districts, in each of which a District Court exists, constituted and acting as I shall describe hereafter.

JURISDICTION. — Five principal divisions of jurisdiction: —

1. Admiralty.<sup>2</sup>
2. Suits of the United States or its officers in matters concerning the collection of the revenue, and other subjects.

<sup>1</sup> [The present number is sixty-nine.]

<sup>2</sup> See Revised Statutes, § 563, subdivision 8.

3. Some miscellaneous cases, in which jurisdiction has been given by special statutes.

4. Bankruptcy.

5. Crimes.

[The present jurisdiction may be stated in more detail as follows:<sup>1</sup>

(1) All crimes cognizable under the authority of the United States, committed within some District, or upon the high seas, the punishment of which is not capital.<sup>2</sup>

<sup>1</sup> [Some less important cases are omitted. For a list of them, see Desty's Federal Procedure, § 49, or Foster's Federal Practice, page 57.]

<sup>2</sup> [Of capital crimes the Circuit Court alone has jurisdiction. The criminal jurisdiction of the Federal courts is defined wholly by acts of Congress. These courts have no common-law criminal jurisdiction, and there is no such thing as a common-law crime against the United States. No act is a crime against the United States until Congress has made it such and affixed a penalty to it. *Jones v. United States*, 137 U. S. 202, 211.]

[The Federal courts have only a restricted criminal jurisdiction within State limits. In most cases, crimes, such as murder and larceny, are made cognizable by the United States courts only when they are committed on the high seas, or in some place, such as an arsenal, within the exclusive jurisdiction of the United States. In case of a murder, for example, committed within Boston harbor, the courts of Massachusetts alone would have jurisdiction. And this would be true although the murder was done on a foreign ship, and both the murderer and his victim were aliens. A foreign merchant vessel, while within State limits, is subject to the laws of the State, and is within the jurisdiction of its courts. But this is not true of ships of war; a ship-of-war carries its own nationality with it, as if it were a part of the soil of the country to which it belongs. Every lawyer ought to understand these elementary rules of international law, so that he may do his share in guiding public opinion aright when an occasion arises for applying them. Thus in the *Barrundia* case which occurred a few years ago, a South American, a fugitive, was taken by the local authorities from an American merchant ship, while she lay in a port of the country to which the man belonged.

(2) Suits for penalties and forfeitures incurred under the laws of the United States,<sup>1</sup> including the contract labor law.<sup>2</sup>

(3) Suits at common law brought by the United States or by any officer thereof authorized to sue.<sup>3</sup>

(4) Causes of action arising under the postal laws.

(5) Suits in equity brought by the United States to enforce the lien of the United States upon real estate for any internal revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent.

(6) Suits against the United States to collect, in certain cases, claims not exceeding \$1000 in amount.<sup>4</sup>

This act caused a great hue and cry in this country, but it was a perfectly legal proceeding. If the ship had been an American man-of-war, the local authorities would have had no right to take the man,—nor would they, if the merchant ship had been upon the high seas. This last case, it will be remembered, was that of the Trent, from which, in mid-ocean, an American naval captain took the Southern Commissioners, Mason and Slidell.]

<sup>1</sup> [*United States v. Whitcomb Metallic Bedstead Co.*, 45 Fed. Rep. 89. The Circuit Court has jurisdiction of suits for penalties or forfeitures only when such jurisdiction is expressly conferred by the act imposing the penalty or forfeiture. *United States v. Mooney*, 116 U. S. 104.]

<sup>2</sup> [In respect to this law (23 Stat. 332), the jurisdiction is concurrent with the Circuit Court. See *United States v. Church of the Holy Trinity*, 36 Fed. Rep. 303.]

<sup>3</sup> [*Rouse v. Hornsby*, 161 U. S. 588. Under this clause, receivers appointed by United States Courts may bring suit. But as to receivers of National Banks, see *Thompson v. Pool*, 70 Fed. Rep. 725; *Stephens v. Bernays*, 41 Fed. Rep. 401; 44 Fed. Rep. 642.]

<sup>4</sup> [24 Stat. 505. See *United States v. Jones*, 131 U. S. 1.]



(7) Suits under the Civil Rights and Elective Franchise laws.<sup>1</sup>

(8) Suits brought by an alien for a tort which violated the law of nations.<sup>2</sup>

(9) Suits against consuls and vice-consuls.<sup>3</sup>

(10) All civil causes of admiralty and maritime jurisdiction "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it, and of all seizures on land and on waters not within the admiralty and maritime jurisdiction," and of proceedings to condemn property taken as prize.<sup>4</sup>

The Bankruptcy Act, of which the District Court had jurisdiction, was repealed June 7, 1878.<sup>5</sup>

The jurisdiction of the District Court is concurrent with that of the Circuit Court in respect to (1) crimes; (3) suits by the United States or an officer thereof; (4) cases arising under the postal laws; (6) certain claims against the United States; and (7) suits under the Civil Rights and Elective Franchise Statutes. In respect to (9) suits against consuls and vice-consuls, the District Court has concurrent jurisdiction with the Supreme Court. In the remaining classes of cases the jurisdiction of the District Court is exclusive.]

1. ADMIRALTY. — No other subject of jurisdiction has been so elaborately and ably discussed as that of the admiralty jurisdiction conferred by the Constitution. Two principal causes have produced this discussion: First, the policy of the common law

<sup>1</sup> [Revised Statutes, § 563.]

<sup>2</sup> [Rev. Stat. § 563.]

<sup>3</sup> [Rev. Stat. § 563.]

<sup>4</sup> [Rev. Stat. § 563.]

<sup>5</sup> [20 U. S. Stat. 99.]

courts in England, and the expression of it by Lord Coke, enforced as it was by those courts through writs of prohibition. The earliest consequence of this is seen in the thirteenth section of the Judiciary Act, which empowered the Supreme Court to issue writs of prohibition to the District Courts, when proceeding as courts of admiralty and maritime jurisdiction.<sup>1</sup> Second, it involved a question of political power between the States and the United States; because everything granted to the admiralty is so much added to the judicial power of the United States, and taken from the power of the States.

The discussion of this important subject was really begun by Mr. Justice Story, in *De Lovio v. Boit*, 2 Gallison, 398, in which he exhausted all the learning then at the command of any lawyer in the United States to maintain the true scope and intent of the admiralty jurisdiction, and place it on the same ground, and give it the same breadth, that belonged to it under the general maritime law of other civilized nations.<sup>2</sup>

<sup>1</sup> [Rev. Stat. § 688. *In re Morrison*, 147 U. S. 14.]

<sup>2</sup> [From about the year 1200 to 1400, the Admiralty Court of England — so called because its first judges were admirals — grew in power, and encroached upon the common-law courts. Then came a reaction, which lasted into the present century. The common-law courts regained their own ground and in turn encroached upon the Admiralty Court. Coke, Chief Justice of the King's Bench, was especially hostile to the admiralty jurisdiction. In the early part of this century, when the Admiralty Court in England was almost at its lowest ebb, our Federal judges were obliged to decide what was meant by those words in the Constitution which extended their authority to "all cases of admiralty and maritime jurisdiction." Did they mean only that limited jurisdiction which was then exercised in England,

The discussion was continued by Judge Ware, in some of the ablest legal dissertations in our language, and renewed by Mr. Justice Story in the cases reported in 3 Mason, 27,<sup>1</sup> and 2 Story's Reports, 176.<sup>2</sup> These discussions related both to the subject-matter of contracts over which the admiralty jurisdiction extended, and the localities within which acts must be done, in order that those courts should have jurisdiction.

In the mean time, several cases came before the Supreme Court of the United States, in which was developed strong hostility against this jurisdiction by some judges, and, for the time being, the decisions ended by restraining it to the ebb and flow of the tide as to locality, and, as will be seen hereafter, in somewhat narrowing it as to contracts. This judicial history, so far as respects locality, is stated with great clearness by Mr. Justice Miller in *The Hine v. Trevor*, 4 Wallace, 555. But after this came the case of *The Eagle*, in 8 Wallace, 15, which finally swept away everything contained in the Act of 1845, mentioned by Mr. Justice Miller,

or did the Constitution mean to confer the full admiralty jurisdiction as it was known to the civilized world? Judge Story took the latter view, and he laid much stress upon the use of the word "maritime" in the Constitution, holding that it was intended to define and amplify the word "admiralty." Fortunately, Judge Story's liberal view of the Constitution in this respect was, as Judge Curtis states, finally adopted by the Supreme Court; and it is significant that, during the past fifty years, the English admiralty jurisdiction has been enlarged by various Acts of Parliament, so that it is now nearly on a par with that exercised by our Federal courts. This whole subject is well stated in Benedict's Admiralty Practice.]

<sup>1</sup> *Peele v. Merchants' Insurance Co.*

<sup>2</sup> *Hale v. Washington Insurance Co.*

except that trial by jury in certain cases is preserved.<sup>1</sup> The local jurisdiction of the admiralty was thus vindicated, and was found to extend, not merely to the high seas, and the ebb and flow of the tide, but to all the navigable waters of the United States, including the great lakes and rivers.<sup>2</sup> It is not necessary to trace historically, in this connection, the progress made by the Supreme Court as to contracts, but it will be perceived when I come to speak of them.<sup>3</sup>

<sup>1</sup> [This Act of 1845 extended the admiralty jurisdiction, in cases of contract and of tort, over the great lakes, but the decision in *The Genesee Chief*, 12 How. 443, followed by the case of *The Eagle*, rendered the statute superfluous. The provision in regard to trials by jury is however preserved in Rev. Stat. § 566. See *The City of Toledo*, 73 Fed. Rep. 220.]

<sup>2</sup> [As to when damages caused by ships to piers and other objects upon land are within the admiralty jurisdiction, see *Charleston Bridge Co. v. The John C. Sweeney*, 55 Fed. Rep. 540, where all the cases are reviewed. See also *Hermann v. Port Blakeley Mill Co.*, 69 Fed. Rep. 646, where a new question arose, — a man working in the hold of a vessel having been injured by a piece of timber sent down without warning by a fellow-workman on the wharf.]

<sup>3</sup> The merely internal waters of a State, although navigated by its own vessels, are not within the admiralty jurisdiction. The waters which are now subject to the jurisdiction are those public navigable waters where commerce is carried on between different States, or with a foreign nation. [The Supreme Court, however, have construed the admiralty jurisdiction in this respect very liberally. In one case they stated the rule as follows: "They constitute navigable waters of the United States, within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition, by themselves or by uniting with other waters, a continued [continuous ?] highway, over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *The Daniel Ball*, 10 Wall. 557. In a later case, the court held that a cause of action arising from a collision between two ships on a canal, within the limits of a single State, both ships

The civil admiralty jurisdiction is of two parts: First, instance causes; second, prize causes. What are instance causes over which the District Courts, as courts of admiralty, have jurisdiction? They fall under two general heads; first, contract; second, tort. The first, contract, depends on the subject-matter; it must be a contract of a maritime nature. The second, tort, depends on the locality of the facts out of which the cause of action arises.

Much difference of opinion has existed at different times concerning the subject of maritime contracts, — what are maritime contracts within the jurisdiction of the admiralty. But gradually principles have been evolved, and they have been applied to so many details, that at present there is not much difficulty in answering the question as to any important class of contracts, whether they are maritime, and come under the jurisdiction of the admiralty or do not. I will state in detail what contracts have been decided to be of admiralty cognizance.<sup>1</sup>

being owned by citizens of that State, was within the admiralty jurisdiction, because the canal was in the line of commerce between Lake Michigan and the Mississippi River. *Ex parte Boyer*, 109 U. S. 629. See also *Miller v. New York*, 109 U. S. 385, 395. In a Massachusetts case (*Rowe v. The Granite Bridge Co.*, 21 Pick. 344) Chief Justice Shaw said that it is not "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable. But in order to have this character, it must be navigable to some purpose, useful to trade or agriculture." But such use may be very slight. See *The Montello*, 20 Wall. 430. In *Commonwealth v. King* (150 Mass. 221), the court took judicial notice of the fact that the Connecticut River, above Springfield, Massachusetts, is not navigable, except for purposes of State commerce.]

<sup>1</sup> [As to the maritime character of a stevedore's service see *The Wivanhoe*, 26 Fed. Rep. 927; *The Main*, 51 Fed. Rep. 954.]

First, contracts of affreightment. The case of *The New Jersey Steam Navigation Company v. The Merchants' Bank*, 6 Howard, 344, raised this general question which was twice elaborately argued, and the decision of the court was that a contract to carry merchandise on the navigable waters of the United States was within the jurisdiction of the admiralty. This case was followed by *Morewood v. Enequist*, 23 Howard, 491, and *The Belfast*, 7 Wallace, 624, and it is now completely settled that the mutual obligations of the shipper and the ship-owner, in respect to merchandise to be carried on the navigable waters of the United States, are entirely within the jurisdiction of the admiralty, whether these obligations result in claims made by the shipper for breach of contract on the part of the ship-owner, or obligations resulting in claims of the ship-owner against the owner of the merchandise; and also, that the form of contract is not material. It may be a bill of lading or a charter-party, or simply by parol. The one thing requisite is, that the merchandise should be placed on board to be carried, and received for that purpose, and out of these two facts spring the relations of the parties, and their legal rights.<sup>1</sup>

It would seem to be a necessary inference from this law, and it is now settled, that similar rights and obligations cognizable by the admiralty are

<sup>1</sup> [This should not be understood as excluding executory contracts of affreightment, which are also within the admiralty jurisdiction, although it is doubtful whether suits upon them can be brought in rem: *Oakes v. Richardson*, 2 Lowell's Dec. 173; *Scott v. The Ira Chaffee*, 2 Fed. Rep. 401, 405; *The Monte A.*, 12 Fed. Rep. 331, 336.]

applicable to passengers as well as merchandise.<sup>1</sup> This was decided in the case of *The Moses Taylor*, 4 Wallace, 411.

Another subject within the undoubted jurisdiction of the admiralty is mariners' wages, concerning which there has never been any dispute, and so far as a mariner makes a claim upon the ship by a proceeding *in rem* the jurisdiction of the admiralty is exclusive (*Leon v. Galceran*, 11 Wallace, 185), because the States cannot create a maritime lien (7 Wallace, 624). Still, mariners may sue at common law, either in the courts of the States, or in the Circuit Court of the United States, if the sum demanded should be sufficient, and their citizenship such as will warrant such a suit. The mate is deemed a mariner, and has the same remedies in the admiralty as a common sailor; but the master has no lien and cannot sue *in rem* (11 Peters, 175),<sup>2</sup> though he may sue in the admiralty *in personam* (3 Mason, 161;<sup>3</sup> 2 Curtis, C. C. R. 271).<sup>4</sup> The admiralty has also jurisdiction over the subject

<sup>1</sup> [It should be remembered that in respect to contracts for the carriage of freight or passengers, as in respect to most civil cases in admiralty, the State courts also have jurisdiction; for, as we have seen, the statute reads "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it." Thus a suit arising from a contract to carry cattle from New York to Liverpool, might be brought either in a State court of New York or in the United States District Court for the Southern District of New York, — or indeed in the Circuit Court, if the citizenship of the parties plaintiff and defendant was such as to give the Circuit Court jurisdiction.]

<sup>2</sup> *Steamboat Orleans v. Phœbus*.

<sup>3</sup> *Willard v. Dorr*.

<sup>4</sup> *Church v. Shelton*.

of pilots and pilotage, as was settled in the case of *Hobart v. Drogan*, 10 Peters, 108. Under the admiralty law, persons who supply materials or repairs for vessels in a foreign port acquire thereby a lien on the ship, and this lien may be enforced by a proceeding in admiralty (7 Wallace, 624).<sup>1</sup> Though the States can create no liens except in home ports, they may create such liens within their own territory, and at one time the admiralty courts of the United States took jurisdiction of liens created by the States for repairs and supplies; but this jurisdiction was finally abandoned, under the action of the Supreme Court of the United States, as evidenced by the twelfth amended admiralty rule, which, with the law that preceded it, is explained in *Maguire v. Card*, 21 Howard, 248.<sup>2</sup>

Another important subject over which the admiralty jurisdiction extends, is that of bottomry and respondentia bonds. The master of a ship in a port of necessity, or whenever he finds himself

<sup>1</sup> *The Belfast*. [See also *The George Dumois*, 68 Fed. Rep. 926. In the absence of a State statute upon the subject, no lien arises for materials supplied to or repairs made upon a vessel in its home port. But if there is a State statute giving such a lien, it is enforceable in the admiralty courts, and not in the State courts. See *The J. E. Rumbell*, 148 U. S. 1, where the whole subject is discussed. A different view was taken in *Atlantic Works v. Tug Glide*, 157 Mass. 525, 159 Mass. 60.]

<sup>2</sup> [The Twelfth Rule was changed back again on May 6, 1872, to read as follows: "In all suits by material men for supplies or repairs, or other necessities, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*." Since this change the courts have entertained suits against vessels on behalf of material men, to whom a lien was given by a State statute, as they did before the rule was first changed in 1858. See *The Lottawanna*, 21 Wall. 558, 579.]



without funds in a foreign port sufficient to enable him to prosecute the adventure, is authorized to pledge the ship, and, in case of necessity, also the cargo, in order to raise funds. He pledges the ship by what is called a bottomry bond, by which he binds the ship to pay the sum of money advanced, and the bottomry premium charged, provided the adventure is completed, and the ship arrives in safety. He does not bind the owners, but only the property, and if the ship fails to arrive, the lender is understood to take the place of an insurer, and cannot recover his money. The lender has no claim to average or salvage, unless one or both are stipulated for in the bond. A respondentia bond is of a similar character, but is applicable to the cargo, which, under the circumstances regulated by the maritime law, the master may also pledge in a similar manner. Over these two subjects, the admiralty has complete jurisdiction.

Policies of insurance have formed, ever since the case of *De Lovio v. Boit*, 2 Gallison, 398, one of the principal battle-grounds on which contests concerning admiralty jurisdiction have been fought out; but it is now settled, by the case of *The Insurance Company v. Dunham*, 11 Wallace, 1, that the admiralty has jurisdiction over policies of insurance.

I now pass beyond the subject of contracts, and arrive at the jurisdiction of the admiralty over jettisons and general average contributions; and I consider that the two cases of *Dupont v. Vance*, 19 Howard, 162, and the last-mentioned case of *The Insurance Company v. Dunham*, effectively settle that the admiralty jurisdiction extends over

these subjects. *Cutler v. Rae*, 7 Howard, 729, was decided upon a different theory of the law, but I believe it would not now be sustained as law, even upon its own special facts.<sup>1</sup>

Salvage services form an undoubted subject of admiralty jurisdiction. A definition of what is a salvage service may be found in 1 Curtis, C. C. R. 353,<sup>2</sup> and there is an important distinction between a salvage service, and a service to be performed upon the sea, for a compensation to be paid at all events, which is pointed out in 2 Curtis, C. C. R. 350.<sup>3</sup> At the same time, it should be borne in mind that there may be a contract to fix the amount of salvage compensation without changing the character of the service, always provided that the compensation is made dependent upon the suc-

<sup>1</sup> [But see Benedict's Admiralty Practice, § 295, note, and Henry's Admiralty Jurisdiction and Practice, page 43.]

<sup>2</sup> *Hennessey v. The Versailles*. [In deciding this case, Judge Curtis said: "The relief of property, from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligations to render assistance, and the consequent ultimate safety of the property, constitute a technical case of salvage."]

There have been some interesting cases upon the question, what property may be the subject of salvage. It has commonly been held that salvage applies only to ships or something in the nature of a ship. Thus in *Cope v. Vallette Dry Dock Co.* (119 U. S. 625), it is broadly said: "No structure that is not a ship or vessel is a subject of salvage." In an earlier case, however, Judge Lowell had decided, in that spirit of independence and of equity which marked his judicial career, that a raft of logs might be the subject of salvage: *Fifty Thousand Feet of Timber*, 2 Lowell's Dec. 64. A recent English case, *Gas Float Whitton No. 2*, [1896] Prob. 42, takes the more technical view acted upon in *Cope v. Vallette*, *supra*, but this case is pending, on appeal, in the House of Lords.]

<sup>3</sup> *The Independence*.

cess of the service, and is not to be paid at all events.<sup>1</sup>

In connection with this subject of salvage services are contracts of consortship, which have heretofore existed in practice, and which are sanctioned and held to be within the admiralty jurisdiction in 3 Howard, 568.

Another contract cognizable in courts of admiralty is the contract of ransom; which, although it grows out of a state of war, is a contract that may be enforced on the instance side of the admiralty jurisdiction. Ransom is an undertaking to pay to captors an agreed sum of money, for a relinquishment of the interest and benefit which they might acquire or consummate in the captured property by the regular adjudication of a prize tribunal, whether it be an interest *in rem*, a lien, or a mere title to expenses. Ransom is usually effected by bills drawn by the master or other agent of the captured vessel or cargo on the owners, and in *Maisonnaire v. Keating*, 2 Gallison, 336, Judge Story held that the cognizance of ransom bills belongs exclusively to the admiralty.

Another subject of admiralty jurisdiction, on the instance side of the court, is surveys. Surveys may be required in two ways: 1st. Where a policy of insurance, by its terms, requires "a regular survey," to declare the vessel unseaworthy and discharge the underwriters. 2d. Where mariners

<sup>1</sup> [When there is a contract to pay a fixed sum, whether the service be successful or not, so that no claim for salvage arises, the salvor may nevertheless proceed *in rem*, for the contract in such a case, being essential to the preservation of the ship, creates a lien upon it. See *The Roanoke*, 50 Fed. Rep. 574.]

and freighters claim to be discharged from their contracts on account of the unseaworthiness of the vessel. In such cases, the admiralty courts of all commercial countries have jurisdiction to ascertain the fact of seaworthiness or otherwise, by laws and customs of the port in which the vessel happens to be; and it seems that the admiralty courts of the United States may exercise this power. *Dorr v. The Pacific Insurance Company*, 7 Wheaton, 582; *Janney v. Columbian Insurance Company*, 10 Wheaton, 411.<sup>1</sup>

[NOTE. — The jurisdiction in admiralty does not depend upon, and is not controlled by, the citizenship or residence of the parties. A libel *in personam* may be maintained within the jurisdiction of a District Court, provided only that service can be made upon the libellee, or that an attachment can be made upon personal property of his within the district. *In re The Louisville Underwriters*, 134 U. S. 488. If a suit in admiralty is between American citizens, or between an American citizen and a foreigner, and the cause of action, as, for instance, a collision, occurred in foreign waters, the court would administer the admiralty law of this country, except that it would take notice of any local law or usage, such as a pilot regulation. The court may, at its discretion, entertain a suit between foreigners, — and it commonly does so, unless there is some particular reason, — such as the request of a consul or minister, or a treaty stipulation, for refusing to take jurisdiction. In such a case, the court would administer the admiralty law as it is understood by the courts of the United States with this qualification: "If the maritime law, as administered by both nations to which the respective ships belong, be the same both in respect to any matter of liability or obligation, such law, if shown to the court, should be followed in that matter in respect to which they so agree, though it differ from the maritime law as understood in the country of the forum." See *Ex parte Newman*, 14 Wall. 152; *The Belgenland*, 114 U. S. 355; *The Welhaven*, 55 Fed. Rep. 80; *The Livius*, 47 Fed. Rep. 825.]

<sup>1</sup> In the Revised Statutes, Chapter 5, Title 53, provision is made for special proceedings to ascertain the seaworthiness of vessels bound to sea, at the instance of the first officer and a majority of the crew.

## CHAPTER XI.

ADMIRALTY (*continued*).

IN the last Lecture, gentlemen, I had traversed, in part, the ground of the admiralty jurisdiction of the District Courts of the United States. I had mentioned the different contracts over which they have jurisdiction, and had advanced somewhat beyond that to cases which depended, not upon admiralty contracts, but still upon the nature of the subject-matter, such as salvage and one or two other subjects to which you will remember I adverted at the close of the last Lecture. I now continue that enumeration.

There are two kinds of action concerning the title and the right of possession of vessels, called petitory and possessory actions. Petitory actions are suits to try the legal title to a vessel, or some part of it; and possessory suits are suits to determine who shall have possession of a vessel, or which part-owners shall have possession of a vessel, for the purpose of employing it. Over both these subjects, admiralty in the United States has jurisdiction. This was decided in the case of *Ward v. Peck*, 18 Howard, 267. Concerning petitory actions it is unnecessary to say more than to repeat what I have

already said, that the purpose of the action is to try the legal title to a vessel, or some part of it. Possessory suits, perhaps, require further observation. As it was said very long ago, vessels are built to plough the seas, not to lie by the walls; and accordingly courts of admiralty take jurisdiction of disputes between part-owners, when they are unable to agree on the mode in which their vessels shall be employed. The court will always assign to the majority the right to dictate the adventure upon which the vessel shall sail, if the majority agree and desire to employ the vessel on any particular adventure; but it will require the majority to give security to the minority for the return of the vessel in like good order and condition as when the adventure was begun. On the giving of such security, the court makes a decree allowing the majority of the part-owners to employ the vessel in the adventure in which they desire to employ it. If the majority do not desire to employ the vessel in any adventure, but the minority do, the court will assign to the minority the right so to employ the vessel on similar terms, to wit, security to return the ship in safety, or make compensation for its loss; but in either of these cases, the ship is employed on account either of the majority, in the first instance, or of the minority, in the second instance, and the other part-owners can receive no compensation for their interest or the use of their interest in the vessel. It is considered simply as an adventure of those who thus employ the vessel, and the profits or the loss are for their account.

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You will find this subject very much discussed and most of these principles stated in a case in 11 Peters, 175.<sup>1</sup>

By the common law, the liability of owners of vessels is limited only by the just claims either of the shippers of merchandise or of those who have suffered from a tort of the master and mariners. By the ancient maritime law, it was otherwise, and the ship-owner could always discharge himself from liability by surrendering his interest in the vessel and freight. That principle of the ancient maritime law of the world was enacted by Congress under the Act of March 3, 1851, which you will find explained in the case of *The Norwich Company v. Wright*, 13 Wallace, 104, where it was held by the court, that, under this Act of Congress, enabling the ship-owner to surrender his interest in the vessel and freight (I think that was a case of collision, but it would be applicable in any case where ship-owners were liable for damages), the admiralty court had jurisdiction to receive such surrender, and appoint trustees to take possession of the subject-matter, the vessel or freight, to turn it into money, bring the money into court, and the court would then distribute it amongst those entitled to it. And in the same case it is, perhaps I should not say decided, but very clearly intimated, that if the ship is entirely lost, and there is no freight which can be attached by the admiralty court, then the liability of the ship-owner is at an end, it being

<sup>1</sup> *The Steamboat Orleans v. Phœbus*. The court never directs a sale in any dispute between part-owners. *Ibid.* [See *The Marengo*, 1 Lowell Dec. 52.]

considered that his liability is only coextensive with his interest in the vessel and freight. This, you perceive, forms a separate subject of admiralty jurisdiction, and I have mentioned it as such.<sup>1</sup>

I come now to a different class of cases under this jurisdiction, namely, maritime torts, and, as I mentioned in the last Lecture, the jurisdiction over torts or wrongs depends on the locality where they are committed. If they are committed on the high seas, or within any navigable waters of the United States, that is, the great lakes or navigable rivers, then they are within the jurisdiction of the admiralty.<sup>2</sup> For instance, personal assaults and

<sup>1</sup> The provisions of the Act of 1851 are re-enacted in Revised Statutes, §§ 4282-4286. But this law does not release the ship-owner from the payment of full costs, if he appears and makes defence. *The Wanata*, 95 U. S. 600. [The rule applies to foreign ships, *The Scotland*, 105 U. S. 24, and to ships engaged in inland navigation, *In re Garnett*, 141 U. S. 1, 11. But the rule does not apply when a ship runs into a building on land, or sets fire to it. *Ex parte Phenix Insurance Co.*, 118 U. S. 610; *The Plymouth*, 3 Wall. 20. See also, as to the limitation of liability, *City of Norwich*, 118 U. S. 468; *The Scotland*, *Ibid.* 507; *The Great Western*, *Ibid.* 520; *Butler v. Boston & Savannah Steamship Co.*, 130 U. S. 527; *In re Garnett*, 141 U. S. 1.

The Act of Feb. 13, 1893 (27 Stat. 445) provides as follows: "If the owner of any vessel transporting merchandise or property to or from any port in the United States, shall exercise due diligence to make said vessel seaworthy, and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, etc."]

<sup>2</sup> [For example, if a collision between two vessels should occur on a river, within the territory of a State, which was not navigable to the sea, by reason of a dam intervening, or for any other cause, the State courts alone would have jurisdiction of it. If a similar collision occurred on a river navigable to the sea, or if it occurred in a



batteries, if committed in either of the localities to which I have just referred, are within the admiralty jurisdiction; but it is necessary, in the case of personal assaults, that the suit should be *in personam*; that is, against the person who committed the assault, in contradistinction to being *in rem*, as it may be in cases of other torts which I shall now proceed to enumerate.

One of them is collisions between two vessels, arising either from neglect of one of them, or from the contributory neglect of both; and in either of these cases the admiralty has jurisdiction. These, however, are cases of proceedings *in rem* as well as *in personam*. A collision case is not necessarily *in rem*; it may be brought against the owner for the neglect or fault of his servants, that is, the master and crew. In that case, as I have just explained, the liability of the owner is limited to his interest in the vessel and freight, and therefore, although, technically speaking, there is jurisdiction *in personam* in case of collision, there is

harbor, or on the sea, within the three-mile limit, the State courts and the United States District Court would have concurrent jurisdiction of it. If it occurred on the high seas, beyond the three-mile limit, the District Court would have exclusive jurisdiction of it. *Manchester v. Massachusetts*, 139 U. S. 264; *Deroe Manufacturing Co.*, 108 U. S. 401. It was held in South Carolina that the jurisdiction of the District Court did not exceed the bounds of the State, and that these bounds do not extend to "the frontier or belt of water recognized by the law of nations," i. e. the three mile limit. *The Hungaria*, 41 Fed. Rep. 109; 42 Fed. Rep. 510. But this decision can be supported, if supported at all, only under the peculiar laws and grants of the State, which are stated in the opinion. See *Humboldt Lumber Manufacturers' Association v. Christopherson*, 73 Fed. Rep. 239.]

generally no practical object to be obtained by such a suit.<sup>1</sup>

Another subject of jurisdiction of torts is spoliations by force on the high seas, or navigable waters of the United States. These spoliations by force may be either by non-commissioned vessels, as by pirates; or by the master and crew, or a portion of the crew, of a vessel which is not a pirate, not engaged in a general system of plunder of all mankind, but who, on some particular occasion, commit an act of spoliation; or they may be committed by vessels commissioned as public armed ships of the United States. In all these cases of non-commissioned vessels, or vessels commissioned by the United States, the admiralty, in this country, has jurisdiction to cause restitution of what is seized, and award damages where restitution alone would not do complete justice. So in the case of foreign ships, ships commissioned by foreign countries, — public armed ships of other countries, to express it differently, — committing acts of spoliation *within our own waters*, that is, *intra fauces terræ*, or within three leagues of the coast, that being considered to be the limit of our exclusive jurisdiction over the high seas; and accordingly an Act of Congress

<sup>1</sup> [It is held that the admiralty law gives no right of action to recover damages for the death of a person killed by a marine tort. *The Harrisburg*, 119 U. S. 199. See also *The Corsair*, 145 U. S. 335. But it seems that when a State statute gives such a right of action, it may be enforced in the Admiralty Court by a suit *in personam*; and if the statute confers a lien upon the offending ship it must be enforced by a suit *in rem* in the Admiralty Court. See *The City of Norwalk*, 55 Fed. Rep. 98 (affirmed in 61 Fed. Rep. 364), and *The Willamette*, 70 Fed. Rep. 874, where the cases are reviewed.]

was passed on the 20th of April, 1818, found in 3 Statutes at Large, 449, § 7, by which jurisdiction was given to the District Courts of the United States in all cases where foreign vessels committed such acts of spoliation within the waters of the United States.<sup>1</sup>

There is another class of cases where foreign vessels may be held responsible in our admiralty courts, — cases where vessels have increased their force here, contrary to our rights and duties as neutrals. For instance, during the wars which grew out of the French Revolution, there were cases where French privateers, commissioned by the French government, increased their force here; that is, they obtained an increase of armament, or some repairs peculiar to public armed ships, in our ports, contrary to our rights and duties as a neutral nation, and then proceeded to prey upon the commerce of England or some other country with which France was at war. That was a breach of our neutrality acts, and accordingly, if such a vessel made a capture, and either the captured vessel was brought into one of our ports, or the vessel which made the capture came into our ports, they were considered to be subject to our jurisdiction, because they had previously been guilty of this breach of our rights and duties as a neutral nation. This was decided in the case of *The Invincible*, 1 Wheaton, 238.<sup>2</sup>

<sup>1</sup> [The waters of the United States also include all "bays, wholly within its territory, not exceeding two marine leagues in width at the mouth," — without regard to the distance of the headlands from the main coast line. *Manchester v. Massachusetts*, 139 U. S. 240.]

<sup>2</sup> [But see a note on this case in Dana's Wheaton, page 551.]

But whenever a public armed ship of a foreign nation, which has been guilty of no breach of duty to us, makes a capture upon the high seas, the question of the rightfulness of the capture must be decided in the courts of the country of the captor, and our courts cannot interfere. This, also, you will find in this same case of *The Invincible*, in 1 Wheaton, 238.

Another class of cases over which District Courts have jurisdiction are revenue seizures, made on the high seas, or on waters navigable from the sea by vessels of ten or more tons burden. That was the limit laid down in the Judiciary Act, and which, I believe, has always since been observed, and such seizures were decided by the Supreme Court to be cases of admiralty jurisdiction. *Whelan v. The United States*, 7 Cranch, 112, involved this question, and the decision, as I have said, was that these were civil cases of admiralty jurisdiction, and to be tried as such, without the intervention of a jury.

So as to informations filed by the District Attorney to enforce forfeitures of vessels for breaches of the statute laws of the United States. There are various laws of the United States for the purpose of preventing the slave trade, and for the purpose of preventing various injuries to foreign countries;—whatever may be the acts of Congress which inflict the forfeiture, information filed by the District Attorney in the name of the United States to inflict such forfeiture is within the jurisdiction of the admiralty; and although it is a case of forfeiture, it is still considered to be a case of admiralty juris-

diction on the civil side of the court. This has been decided in reference to various acts of Congress. The earliest case, a very early one, is *The United States v. La Vengeance*, 3 Dallas, 297. Another case is that of *The Sally*, 2 Cranch, 406.

The District Court also has the entire prize jurisdiction. This was conferred upon that court by the Judiciary Act and by the Act of Congress passed on the 30th of June, 1864, found in 13 Statutes at Large, 306. By this latter act, the entire subject of prize and prize proceedings is regulated; and it may be worthy of note, as we go along, that, by the thirteenth section of this act, appeals from the District Court in prize cases, instead of being taken to the Circuit Court, as they are in all other cases, are taken directly to the Supreme Court. The Circuit Courts, therefore, have no jurisdiction over prize cases; the District Court and the Supreme Court possess the entire jurisdiction.

I have now gone through with those subjects over which the District Courts of the United States have admiralty jurisdiction, and I now wish to direct your attention to some subjects over which it has been decided they have not jurisdiction; because it is as important to be acquainted with the negative as it is with the affirmative on this subject.<sup>1</sup>

<sup>1</sup> There is nothing in the nature of admiralty jurisdiction, or of an appeal in admiralty, to prevent parties, either in prize or instance causes, from submitting their case by rule of court to arbitration, as in a court of common law or equity. For the mode of acting on an award in admiralty proceedings on appeal, see *United States v. Farragut*, 22 Wallace, 406.

First, then, admiralty courts have no jurisdiction over contracts to build vessels; for, although vessels are instruments of commerce, and are necessary instruments of maritime commerce, yet nevertheless such a transaction is considered to be so entirely a transaction upon the land, that the Supreme Court has held the Admiralty has no jurisdiction. This was decided in the case of *The Ferry Company v. Beers*, 20 Howard, 393.<sup>1</sup>

Nor have they jurisdiction over a contract to supply engines for a sea-going steamer. This was decided in the case of *Roach v. Chapman*, 22 Howard, 129.

Nor have they any jurisdiction to enforce mortgages upon ships, as was held in *Bogart v. The John Jay*, 17 Howard, 399. And where the builder of a ship had, by the contract, renewed a lien to himself as security for some part of the money which he was to receive for building the ship, it was held that the admiralty had no jurisdiction to enforce this lien; that it was like the case of a mortgage on a ship, somewhat different in form, but the same in substance and principle, each being intended as a security for money, and therefore there was no jurisdiction. That was held in 20 Howard, 393.<sup>2</sup>

Nor has the admiralty any jurisdiction over accounts between part-owners of vessels. That was

<sup>1</sup> [*The Glenmont*, 34 Fed. Rep. 402.]

<sup>2</sup> [*Britton v. The Venture*, 21 Fed. Rep. 928. But the Admiralty Court may entertain claims against a fund in the Registry, although the claims are based on mortgages. *The Lottawanna*, 21 Wall. 558; *The Kate O'Neil*, 65 Fed. Rep. 111.]

decided in 11 Peters, 175. And, speaking generally, it may be said that the admiralty has no jurisdiction to take accounts. Its proceedings are summary and simple, and not adapted to the taking of complicated accounts. There are cases, however, in which, the jurisdiction of the Admiralty being perfectly clear and settled, it may become necessary incidentally to take an account, in the exercise of that jurisdiction, and there accounts are taken; as, for instance, you know that, in the whale fisheries, the officers and the crew, instead of being paid wages, go on what is called a "lay," or share; and of course if the managing owner, on the return of the ship, should refuse to pay a mariner what he demands as his due, the amount which is due can only be ascertained by taking an account of the proceeds of the voyage; and disputes between mariners, and even officers, and the managing owners, are not infrequent in practice, and where they occur, the court, having first decided that the mariner or officer is entitled to his share, either with or without deduction or increase, as the case may be, if the parties do not agree upon what his share is, it is necessary to refer the case to an assessor, to take an account of the voyage.<sup>1</sup> This illustrates what I mean when I say, that, if the admiralty has jurisdiction, it will not be prevented from exercising that jurisdiction simply because it is necessary to take an account; but they have not jurisdiction founded simply upon a prayer that an account may be taken, even between part-owners of a vessel.

<sup>1</sup> *Macomber v. Thompson*, 1 Sumner, 384.

Nor have they any jurisdiction over trusts, either actual or constructive. This was discussed and explained in the case of *Kellum v. Emerson*, 2 Curtis's C. C. R. 79. And in accordance with this is the settled law, that they have nothing to do with the equitable titles to vessels: they proceed upon legal titles, not upon equities.<sup>1</sup>

Mr. Justice Story so held in the case of *Andrews v. Essex Company*, 3 Mason, 16; and in the same case he decided that the admiralty had no jurisdiction to decree specific performance of a contract, which is a necessary consequence of the fact that they have not equity jurisdiction in that sense. They can compel, in some cases, the performance of a contract, but not in the way that a court of equity can do it; and you may consider it is settled law, that the admiralty acts upon contracts that are completed, and not upon those which, being left incomplete by the parties, require the aid of a court of equity to complete them, as well as to enforce them after they are completed.

The admiralty has no jurisdiction over set-offs. It may, under some circumstances, make deductions from a claim, provided the ground of such deductions is so connected with the claim itself as to constitute an equitable right to a deduction; but they will not take cognizance of an independent claim, and set off that independent claim against what is asserted to be due and sought to be recovered by the libel. You will find this laid down in the case of *The Water-Witch*, 1 Black, 494.

I think I have now gone over, sufficiently in

<sup>1</sup> [See *The Eclipse*, 135 U. S. 599.]



detail for the purposes of these Lectures, the admiralty jurisdiction, its extent, what subjects it covers, and what subjects it does not cover; and I now wish your attention to some things I have to say about the jurisprudence which is administered by this court in the exercise of its admiralty jurisdiction.

It is necessary to divide this subject, and consider, first, what law this court administers in instance causes, using that technical term as applying to civil causes both of contract and of tort, and those other civil causes which I have mentioned over which this court has jurisdiction.

It has been said, and I have no doubt correctly, that, so far as this court exercises jurisdiction, it is a court of equity acting on maritime affairs.<sup>1</sup> That was the definition given by Mr. Justice Story in the case of *The Sarah Ann*, 2 Sumner, 206. At the same time, it would not be safe to assume, as you have already learned from what I have said, that a court of admiralty is capable of administering many of those rules and principles of equity which are applied by courts of equity. The peculiar law which admiralty courts administer is, first, the maritime law of the world, — that

<sup>1</sup> [With this difference perhaps: it is the characteristic of admiralty to act *in rem*; whereas it is the characteristic of equity to act *in personam*. As to what are maritime contracts, *i. e.* within the admiralty jurisdiction, see *The Progresso*, 46 Fed. Rep. 292; *Haller v. Fox*, 51 Fed. Rep. 298; *Danace v. The Magnolia*, 37 Fed. Rep. 367; *Wishart v. The Joseph Nixon*, 43 Fed. Rep. 926. A contract to procure insurance is not a maritime contract. *Marquardt v. French*, 53 Fed. Rep. 603. As to what is a ship, see *Wood v. Two Barges*, 46 Fed. Rep. 204; *The City of Pittsburgh*, 45 Fed. Rep. 699; *Pile-Driver E. O. A.*, 69 Fed. Rep. 1005.]

law which, in the sense of the Roman law, is *jus gentium*. The Romans did not mean by *jus gentium* what we call the law of nations; that is, law which regulates the rights and duties of nations in respect to each other; but they meant those laws found in all nations, and substantially the same in all. Those principles and rules of law which existed everywhere, they called by the name *jus gentium*; and this maritime law does exist in all civilized maritime countries, though it has been restricted to some extent in England, through the prohibitions which the common law courts issued to the Admiralty Court. With that exception, and the consequent result that there has been on some subjects a certain narrowness in the law of England which exists to this day, the admiralty law of the world is much the same everywhere. There are some positive differences; but in its great principles this law exists everywhere, and is, speaking generally, substantially the same everywhere.

This law is drawn from various sources. First, from the codes which were made in the Middle Ages, the most ancient and venerable of which is the *Consolato del Mare*, supposed to have originated either on the Mediterranean, or in some part of Spain, and followed by others, from time to time drawn up and enacted into positive law by different countries for the government of their commerce. These codes are all collected by Pardessus, in his great work, in six volumes quarto, and they may be said to be the principal sources of the maritime law, or perhaps evidences, rather than sources, of the maritime law of the world to this day.

Amongst the codes he has thus collected is the famous ordinance of Louis XIV., which was drawn up by the great lawyers of his reign, and enacted into law by a decree of the king, and which, from its comprehensiveness, exactness, and close adaptation to the maritime affairs of the world, though not of authority with other nations, has been always much resorted to as evidence of what the law ought to be and is. In addition to these sources are the Continental and English and American writers on maritime law, both older and more recent. And on this subject France has produced perhaps the most important works, unless you consider that those of a more recent time in our own country, the authors of which have had the advantage of consulting and being informed by these French books, should be to us more useful, as probably they are.

Another source is the decisions of the courts of admiralty and common law on maritime questions. They have now become numerous and of great importance and value; but I am old enough to remember when they were few, and when comparatively little light could be gained upon very many questions of admiralty law by consulting any decisions, either English or American. Light was to be looked for rather from the other sources to which I have adverted than from decisions in the courts.<sup>1</sup>

<sup>1</sup> Judge Curtis did not mean to intimate, in these observations, that the general maritime law of the world has any inherent force of its own in this country. It derives its force, in the courts of the United States, from that provision of the Constitution which

I would ask you to look at a case in 2 Curtis's C. R. 427,<sup>1</sup> where you will see some distinctions pointed out between the law the Admiralty can administer, the sources to which it can go for law, and the sources to which other courts can resort; and perhaps it is as well for me to refer you to that without further observation, as you will see there the explanation which I would desire to make.<sup>2</sup>

The last source of admiralty law in the courts of the United States is of course perfectly imperative, and that is acts of Congress.

A very considerable number of subjects are regulated by positive laws of Congress, and, where such laws exist, of course they must govern, no matter what may be the law elsewhere. But, in general, it will be found that there is great conformity, so far as I know, almost absolute conformity, between the regulations of Congress and the general principles of the admiralty law administered in the courts of other civilized countries;

extends the judicial power to "all cases of admiralty and maritime jurisdiction." The interpretation of these expressions is a judicial question; and hence the Supreme Court of the United States, assuming the general maritime law to be the basis of the system, as it was familiar to our lawyers and statesmen at the adoption of the Constitution, has always inquired, in particular cases, what has been received as law in the maritime usages of this country, or has been enacted by Congress. Upon any particular question, therefore, when it has been ascertained that a case was, at the adoption of the Constitution, a subject of admiralty jurisdiction according to the general maritime law of the world, that law becomes a source of the jurisprudence which is to be administered. See this subject learnedly discussed in *The Lottawanna*, 21 Wallace, 558.

<sup>1</sup> *The Larch*.

<sup>2</sup> [The decisions of the Colonial admiralty courts are of authority. See *Cunningham v. Hall*, 1 Cliff. 43.]

and the tendency in modern times and of late years has been liberal. As one amongst the many instances to which I might refer, I will mention the act I have already mentioned, which limits the liability of owners of vessels in conformity with the ancient and well-settled admiralty law, and in opposition to the common law.

Among the peculiarities of the jurisprudence of the admiralty is the fact that there is no statute of limitations which, *proprio vigore*, applies to a suit in the admiralty. Of course, I do not mean to be understood that there is no limitation of actions. There is; but the limitation is not derived from any positive law. The better opinion is that courts of admiralty act, as to some extent courts of equity do, by analogy to the different statutes of limitations, and that the general principle upon which they act is, that they will not enforce a stale claim; that where a party, knowing his rights, has laid by for an unreasonable length of time, and the court can see that the condition of the other party has been changed, and changed for the worse, by reason of this delay, then the court will not enforce the claim. And sometimes this principle is applied with considerable strictness, especially where a *bona fide* purchaser has intervened, and where his rights will be sacrificed by the enforcement of the claim. The subject is a good deal discussed in the case of *The Sarah Ann*, 2 Sumner, 206.<sup>1</sup>

In speaking of the modes of proof in the Circuit Courts, I believe I have said nearly all that is necessary upon the same subject as applicable to

<sup>1</sup> [See *Southard v. Brady*, 36 Fed. Rep. 560.]

District Courts. To a great extent the modes of proof are the same, and the rules of evidence are the same. There is, however, this distinction, that the Circuit Court [of Appeals] as well as the Supreme Court, is an appellate court from the District Court<sup>1</sup> in admiralty cases, and, being an appellate court, it has been thought necessary to put the evidence taken in the District Court upon the record, so that it should go up as part of the record, instead of having the witnesses re-examined in the court above; and when I was speaking of the modes of proof in the Circuit Court, I went over in detail both the statutes and decisions on that subject. In the District Court, it is most usual in practice to examine the witnesses orally. As I have said, they are courts which proceed with rapidity, and their proceedings are simple, as well as rapid. They must necessarily be so in order to do justice in a great class of cases, because, if a dispute occurs between the seamen and owners of a ship, or between the shippers and ship-owners, and in a variety of other cases, it is of the utmost importance that a speedy decision should be reached, and, generally speaking, the evidence would disappear if it were not adduced and used promptly after the suit was brought. The usual practice, therefore, in the District Courts, is to examine the witnesses orally. They may be examined before

<sup>1</sup> [Since the Act of March 3, 1891, the appeal in admiralty cases lies not to the Circuit Court, but to the Circuit Court of Appeals. See, on this subject, *ante*, pp. 74, 76-78. The whole case is reviewable in the Circuit Court of Appeals, — facts as well as law. *The State of California*, 49 Fed. Rep. 172; *The Havilah*, 48 Fed. Rep. 684.]

a commissioner if they are about to leave the country, so that their evidence cannot be adduced in court orally at the trial; but excepting these *de bene esse* cases, it is almost the universal practice to examine the witnesses orally in the presence of the judge. Then, if it is supposed there will be an appeal, there is a provision in the Act of Congress which I have read to you in speaking of the Circuit Courts, under which the testimony of a witness may be taken down by the Clerk; and that may be certified, if there should be an appeal to the Circuit Court [of Appeals], and even to the Supreme Court, if there is an appeal there, with the same effect as if the witness had given a deposition before an examiner.<sup>1</sup>

What I have now said applies altogether to instance causes. The subject of prize jurisdiction draws into that court the great body of public international law. Whatever public international law, — that is, laws regulating the rights and duties of nations as between themselves, — whatever public international law exists, that court has occasion to administer in prize causes, and of course it resorts to the proper sources to learn what that law is. The approved writers on the subject, the decisions which have been made in different countries, chiefly in England and in America, and any evidence by means of treaties or conventions which tends to show what principles, by general consent of nations, have been agreed to and settled, these courts have occasion to consider and apply. Of course, it is not within the scope of these

<sup>1</sup> [See on this subject *The Philadelphian*, 60 Fed. Rep. 423.]

Lectures for me to say any more than to intimate to you what the sources are to which these courts must resort, and to which the practitioners in these courts must resort, in order to ascertain what are the proper principles to be applied in prize cases. It is a great subject, as you know.

There is one peculiarity in the mode of proceeding in prize cases, and that is, that the evidence in the first instance all comes from the papers and crew of the captured ship. You will find this explained, as well as the mode of proceeding connected with this rule, in 2 Wheaton, 76,<sup>1</sup> and 6 Wheaton, 1.<sup>2</sup> Accordingly, it is the duty of the captors, when they come into port, to bring into court all the ship's papers, of every kind, under the proper solemnities to prove that they have brought them all, and that they are genuine papers taken from the ship. They are deposited in court, and then the officers and crew of the captured ship are examined upon interrogatories, and those interrogatories are settled in a particular form. If you have any curiosity to see a set of them framed by a very eminent judge, you will find it in the Appendix to the second volume of Sprague's Reports. Judge Sprague, at the commencement of hostilities in the late civil war, when this prize act to which I have referred was passed, was required, in common with all other District Judges, to settle these interrogatories, *in preparatorio* as they are called, which are to be administered to the officers and crew of a captured ship; and a set of them is found in that Appendix.

<sup>1</sup> *The Dos Hermanos.*

<sup>2</sup> *The Amiable Isabella.*



The case being thus prepared, — the preparation consisting of the papers found on board the prize and the evidence of the officers and crew of the prize, taken in the manner I have mentioned, — it comes before the court; and if the court finds there are difficulties in the case, that there are doubts concerning matters of fact, they then make an order for what is called further proof, and under that order such further evidence as is indicated by it is taken; for the order is always specific as to the topics upon which evidence may be taken. The case is not opened at large, as it might be in proceedings on the civil side of the court, but the court, finding doubts upon some particular points, indicates that further evidence besides that of the officers and crew, or even a re-examination of them, may be had upon these particular points; and this is called an order for further proof. And this may be made, not merely, in the first instance, by the Circuit Court or the District Court, but it may be made even by the Supreme Court, if, upon an examination of the case, as it comes before them, they find it needful.

I desire to say a few words upon the subject of pleadings in the Admiralty. They consist of a libel, as it is called, which is a petition setting forth the cause of action in distinct articles; an exception to the libel, if the respondent thinks that the libel does not show a cause of action, — it is in the nature of a demurrer, but it is called an exception, because these proceedings are according to the course of the civil law, and “exception” is the name of what we call in the common law or in

equity a demurrer; and an answer. The libel, the exception, and the answer cover the pleadings in the Admiralty. They are simple and easily understood, but a pretty strict observance of such rules as do exist is required. There are no technical rules of variance as there are at the common law, but yet the allegations are required to be precise and sufficiently full, and the proof must correspond with the allegations. The rules upon this subject you will find laid down in the case of *McKinlay v. Morrish*, 21 Howard, 343; *The Commander-in-Chief*, 1 Wallace, 43; and in the rules framed by the Supreme Court for the government of admiralty practice.

The admiralty courts are extremely liberal in allowing amendments.<sup>1</sup> They may be allowed, not merely by the District Court, but by the Circuit Court [of Appeals] on appeal, and even by the Supreme Court; though of course it is very desirable not to be in a position to be obliged to ask for leave to amend, because it is generally attended with inconvenience and delay, and sometimes with a good deal of expense. The practice of these courts is regulated partly by the rules established by the Supreme Court of the United States, under the Act of August 23, 1842,<sup>2</sup> which has been repeatedly referred to in these Lectures, and partly by the rules made by each District Court; and

<sup>1</sup> [See *The Mabey*, 10 Wall. 419; *The Charles Morgan*, 115 U. S. 69.]

<sup>2</sup> [See *The Corsair*, 145 U. S. 335. These rules will be found in an appendix to Benedict's Admiralty Practice, the third edition of which was published in 1894.]

when neither the rules of the Supreme Court nor the rules made by the particular District Court are sufficient to solve a difficulty which arises in practice, then the judges recur to the writers on the subject of admiralty practice whose works are received as authority, and, to some extent, to the decisions which have been made and reported in these courts. There are several books of authority on this subject, one of which is Clerke's *Praxis*; another is Taylor's *Maritime Law*. We have also Dunlap's *Admiralty Practice*, — the work of a member of the bar of the county of Suffolk, who was formerly District Attorney, and had a good deal of knowledge of practice in these courts, — and Conkling's *Admiralty Practice*. There are also several books written by gentlemen in New York which are very familiar to you, no doubt, or with which you can make yourselves familiar (with their names at least) by looking at them on the shelves.<sup>1</sup>

In case of the death of the libellant or defendant in the admiralty, there is no Act of Congress which is precisely applicable, as there is in the case of the death of a party to a suit at law or in equity, but courts of admiralty have acted from analogy to that Act of Congress, and found no difficulty in allowing the personal representative of the deceased party to appear and take upon himself either the prosecution or the defence of the suit. This subject you will find discussed in the case of *The Octavia*, 1 Mason, 149, and in *Nevitt v. Clarke* in Olcott's *Admiralty Reports*, 316.

<sup>1</sup> [See Benedict's *Admiralty Practice*, Henry's *Admiralty Jurisdiction and Procedure*, and Foster's *Federal Practice*.]

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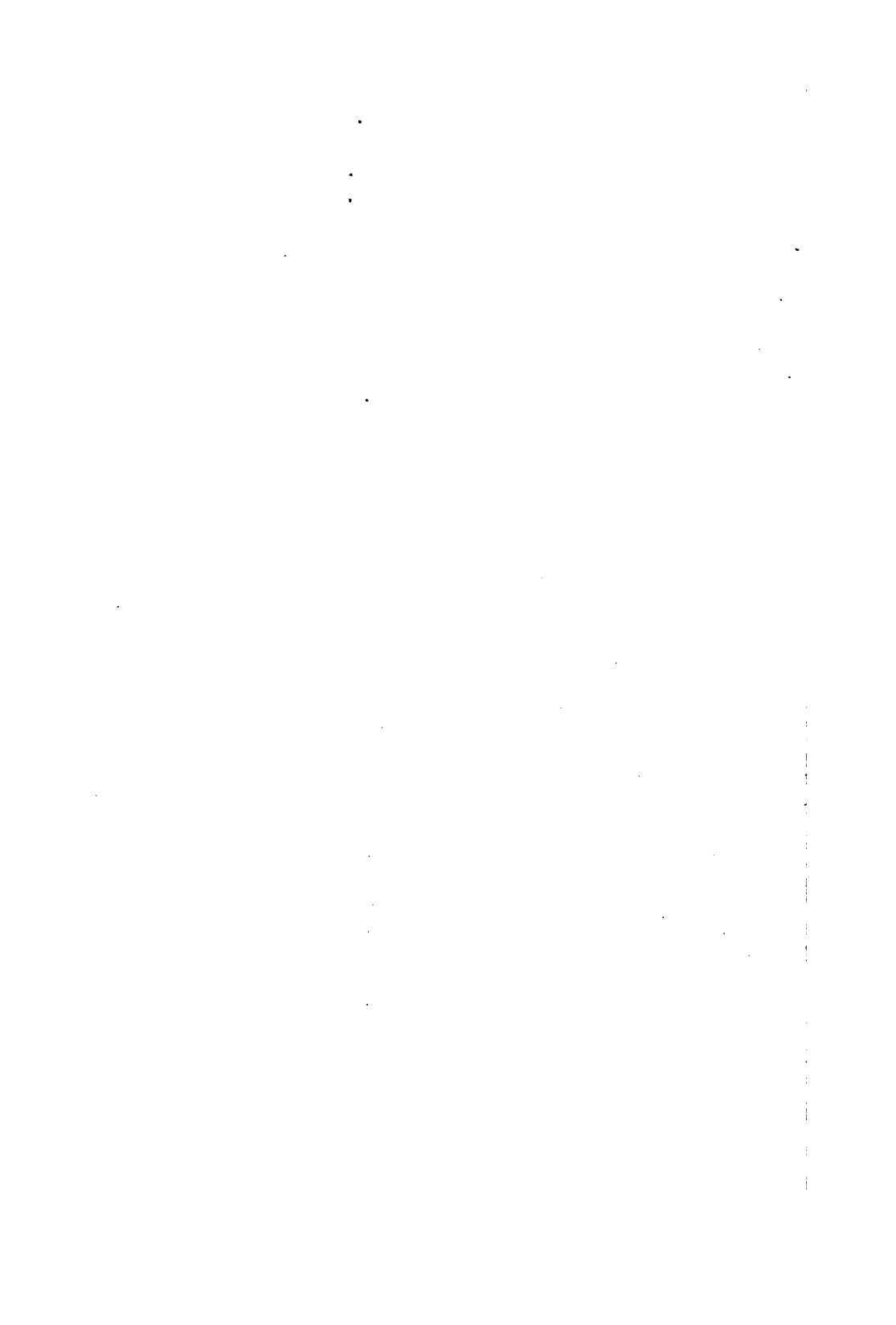
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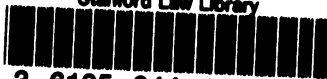
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